IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 68

Suit No 795 of 2014

Between

Independent State of Papua New Guinea

… *Plaintiff*

And

PNG Sustainable Development Program Ltd

… *Defendant*

Originating Summons No 234 of 2015

In the matter of Clause 9 of the Memorandum of Association of PNG Sustainable Development Program Limited

And

In the matter of Article 52 of the Articles of Association of PNG Sustainable Development Program Limited

Between

Independent State of Papua New Guinea

… *Plaintiff*

And

PNG Sustainable Development Program Ltd

… *Defendant*

JUDGMENT

[Charities] — [Charitable trusts] — [Essential requirements]
[Companies] — [Memorandum and articles of association] — [Effect]
[Companies] — [Members] — [Rights]
[Contract] — [Breach]
[Contract] — [Contractual terms] — [Implied terms]
[Contract] — [Formation] — [Certainty of terms]

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v
PNG Sustainable Development Program Ltd

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3–5, 9–13, 16–20, 24, 27 and 30 April; 14–15 August 2018

2 April 2019 Judgment reserved.

Vinodh Coomaraswamy J:

1 This is a dispute about the corporate governance of the defendant, PNG Sustainable Development Program Ltd ("PNGSDP"). PNGSDP was incorporated in Singapore in October 2001 with two shareholders: (a) the Independent State of Papua New Guinea ("the State"); and (b) BHP Minerals Holdings Pty Ltd ("BHP"). By this action, the State seeks to establish the existence of and enforce rights of control and oversight which it claims to have over PNGSDP's operations and assets.

2 The State and BHP incorporated PNGSDP to be the vehicle to which BHP would divest its shares in a mining company called Ok Tedi Mining Limited ("OTML"). OTML operates a highly profitable mine in the Western Province of Papua New Guinea. The parties intended PNGSDP to hold BHP's shares in OTML and to apply the income derived from those shares to advance a programme of sustainable development in Papua New Guinea.

3 The corporate governance of PNGSDP was uneventful from 2001 until 2011. In 2012 and 2013, however, PNGSDP made several material changes to its corporate governance framework. The effect of these changes was to dilute the State's powers of control and oversight over PNGSDP. The State brings this action to challenge and reverse those changes.

4 The State's pleaded case is that, quite apart from the agreement recorded in the suite of written contracts which were executed on the occasion of PNGSDP's incorporation, there exists an oral agreement that: (a) the State has certain rights of control and oversight with regard to PNGSDP; (b) those rights cannot be altered without the State's consent; and (c) the State is entitled to enforce those rights directly against PNGSDP.

5 Underlying the State's case is the broader argument that it could never have agreed when it established PNGSDP that PNGSDP could be free to cast off unilaterally the State's rights of control and oversight. The directors of PNGSDP may be the guardians of its corporate interests, but those narrow corporate interests are subsumed in the broader imperative of improving the lives of the people of Papua New Guinea through a programme of sustainable development. And the State, as the democratically elected government of that people, is the ultimate and legitimate guardian of that broader interest. If PNGSDP's case in this action is to be believed, BHP and the State intended to endow PNGSDP with such untrammelled freedom that it would have the power even to amend its own objects, to abandon the purposes for which it was established and to apply its considerable wealth to its own ends. According to the State, that simply cannot be.

6 PNGSDP, for its part, points out that BHP divested its shares in OTML as part of an immensely complex transaction which was documented with the assistance of sophisticated legal advisers in an suite of interlocking and interdependent written contracts. That suite of written contracts is exhaustive. The structure of the parties' agreement simply left no scope for such a critical aspect of PNGSDP's corporate governance framework to be left entirely undocumented in that suite of contracts and to be the subject instead of an oral agreement.

7 According to PNGSDP, everything that it did in 2012 and 2013 was done in accordance with that suite of written contracts. Although it is true that those written contracts clearly oblige PNGSDP to apply the income from the OTML shares to advance a programme of sustainable development in Papua New Guinea, the State's right to hold PNGSDP to that obligation is also set out clearly – and exhaustively – in those written contracts. The common intention when PNGSDP was established was that it should eventually become a self-governing and self-perpetuating organisation modelled on the Ford Foundation. The changes to its corporate governance framework which PNGSDP effected in 2012 and 2013 – and which the State challenges in this action – is not a case of PNGSDP or its directors going rogue. It is just the next step in carrying into effect the common intention when PNGSDP was established.

Facts

The Ok Tedi mine

8 The factual background to this dispute starts in 1976. That is when the State and BHP entered into a contract to develop the Ok Tedi mine. The Ok Tedi is a particularly rich gold and copper mine in the Western Province of

Papua New Guinea. In accordance with that contract, OTML was incorporated as a Papua New Guinean company limited by shares. Its shareholding was split as follows:[1]

BHP	52%
The State	20%
Inmet Mining Corporation	18%
Mineral Resources Ok Tedi No 2 Limited	10%

OTML's primary assets were and are the physical mine itself and a mining licence which gives it the right to exploit the mine until 2022.

9 The Ok Tedi mine was immensely profitable from the outset. It has consistently made, by itself, a substantial contribution to the gross domestic product of Papua New Guinea. However, being an open case mine, the mining activities there have caused significant environmental damage in the Western Province. BHP eventually became concerned about the economic and reputational cost of that damage. In late 2000, BHP expressed its intention to shut down the mine early, before its mining licence ended and well before the mine's economic life ended.[2] BHP communicated this intention to the State.

10 The Prime Minister of the State in late 2000 was Sir Mekere Morauta. Sir Mekere was not keen to close the mine.[3] The State recognised that the mine had caused significant environmental damage and that it would cause even more damage as long as it was in operation. But it felt on balance that the mine should

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1 Mr Charles Mercey's AEIC at paragraph 4.

2 Mr Charles Mercey's AEIC at paragraph 5.

3 Sir Mekere Morauta's AEIC at paragraph 22.

continue operating because of the significant economic benefits it brought to Papua New Guinea and to the people of the Western Province.[4]

11 In late 2000, OTML appointed NM Rothschild & Sons Ltd ("Rothschild") to facilitate negotiations between all the relevant stakeholders on arrangements to allow BHP to exit from OTML while allowing the mine to continue operating.[5] In June 2001, BHP entered into a merger with Billiton plc. The merged company came to be known as BHP Billiton Ltd ("BHPB"). Nothing material to this dispute turns on the merger. For convenience and except where necessary, therefore, I shall not distinguish between BHP and BHPB in the remainder of this judgment.

12 Negotiations proceeded apace for BHP's exit from OTML between BHP, the State, OTML's shareholders and OTML's stakeholders. By the middle of 2001, negotiations had advanced to the point where parties had reached a broad, tentative consensus on key issues. That consensus is recorded in a document dated 29 June 2001 and titled "Heads of Agreement".

13 The Heads of Agreement envisages: (a) BHP transferring 90% of its shareholding in OTML to a special purpose vehicle; and (b) the State releasing BHP from, and indemnifying BHP against, claims arising from all liability for the environmental damage caused by the mine. Because the parties had not yet arrived at a consensus on a number of other issues, the Heads of Agreement explicitly records that it is not legally binding.[6]

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4 Sir Mekere Morauta's AEIC at paragraph 22.

5 Sir Mekere Morauta's AEIC at paragraph 24.

6 2AB1234.

14 Negotiations continued. By October 2001, BHP's exit plan was sufficiently concrete for the parties to take steps which were legally binding. The thrust of the exit plan was for BHP to gift its entire shareholding in OTML to a special purpose vehicle in return for: (a) the State releasing and indemnifying BHP in relation to liability arising from its operation of the mine; (b) the State guaranteeing that it would not prosecute BHP in connection with its operation of the mine; and (c) the State enacting legislation giving statutory effect to these key points.

15 PNGSDP was duly incorporated on 20 October 2001 in Singapore to be the special purpose vehicle to whom BHP would divest its OTML shares. Singapore was chosen for a number of reasons: (a) because of its robust corporate governance regime; (b) because of its relative tax advantages; and (c) because Singapore law allows a company's liability to be limited by guarantee.[7]

16 On 20 December 2001, the State duly passed the Ok Tedi Mine Continuation (Ninth Supplement) Agreement Act 2001 (PNG) (the "Ninth Supplement Act"). The Ninth Supplement Act gave the force of law in Papua New Guinea to the key elements of BHP's exit plan.[8]

PNGSDP's corporate constitution

17 It is common ground that PNGSDP's corporate constitution is set out in three documents: (a) its Memorandum of Association ("the Memorandum"); (b) its Articles of Association ("the Articles"); and (c) a document called the "Program Rules" which is annexed to and forms part of the Articles.

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7 Mr Charles Mercey's AEIC at paragraph 14.

8 Dr Iacob Weis' AEIC at paragraphs 37–38.

18 PNGSDP's Memorandum is typical of the memorandum of association of a company limited by guarantee. It simply sets out in broad terms the objects and powers of PNGSDP.

19 PNGSDP's Articles, too, are for the most part typical of the articles of association of a company limited by guarantee. The Articles set out in some detail the internal governance framework of PNGSDP. This includes, amongst other things, the procedures for: (a) appointing members; (b) appointing directors; and (c) holding and conducting meetings of both members and directors. In particular, Article 24 provides that BHP has the right to appoint three of PNGSDP's six directors (the "A" directors) and that three agencies of the State identified in Article 24 by name have the right to appoint one director each (the "B" directors). The provisions of the Articles, including Article 24, feature heavily in this dispute. I shall discuss them in greater detail as they become relevant.

20 Unlike the Memorandum and the Articles, the Program Rules are a bespoke document, unique to PNGSDP. The purpose of the Program Rules is to govern how PNGSDP's income – primarily the dividends declared on its OTML shares, but also its investment income, is to be managed and applied. As a matter of form, the Program Rules are annexed to the Articles as a schedule. They therefore take effect as part of the statutory contract comprised in the Articles. But the Program Rules also have independent contractual effect. Thus, although both the State and BHP are not parties to the statutory contract embodied in the Articles and cannot therefore have any rights under the Articles which are directly enforceable against PNGSDP, it is common ground that both the State and BHP have a legal right: (a) to veto any amendment by PNGSDP to the Program Rules; and (b) to compel PNGSDP to comply with the Program

Rules. The Program Rules also feature heavily in this dispute, and I shall discuss them in greater detail as they become relevant.

Other transaction documents

21 The incorporation of PNGSDP on the terms set out in its constitutional documents was only the first of a series of steps which the parties implemented to carry out BHP's agreed exit plan. The State and BHP continued to enter into yet more written contracts after PNGSDP's incorporation. Now, however, PNGSDP was a party to these further contracts. The contracts which form part of this suite and which are relevant to this dispute are:[9]

(a) a master agreement dated 11 December 2001 between the State, BHP, BHPB, PNGSDP and certain other entities (the "Master Agreement");

(b) a deed of indemnity dated 11 December 2001 between PNGSDP and BHP;

(c) a deed of indemnity dated 11 December 2001 between PNGSDP and the State;

(d) a security deed dated 7 February 2002 between PNGSDP, OTML and Insinger Trust (Singapore) Limited ("Insinger") ("the Security Deed");

(e) a security trust deed dated 7 February 2002 between PNGSDP, OTML, BHP and Insinger ("the Security Trust Deed"); and

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9 Statement of Claim at paragraph 7; Defendant's Closing Submissions at paragraph 23.

(f) an equitable mortgage of shares dated 7 February 2002 between PNGSDP and Insinger.

22 After the parties executed this suite of contracts, BHP transferred its entire 52% shareholding in OTML to PNGSDP. That transfer took place on 7 February 2002.[10]

Changes to PNGSDP's governance structure in 2012 and 2013

23 As I have noted, PNGSDP's corporate governance was quite uneventful from the time of its incorporation until 2012. Its corporate constitution was amended during that period. These amendments included amendments to the Program Rules[11] and amendments to substitute one State agency for another State agency as being empowered to appoint a "B" director.[12] None of these changes attracted any controversy or engendered any litigation.

24 The same cannot be said of the changes to PNGSDP's corporate governance which took place in 2012 and 2013. An external observer could well conclude that these changes to PNGSDP's corporate governance were not unconnected to changes to Papua New Guinea's national governance around that time. First, some background: Sir Mekere served as prime minister of Papua New Guinea from 1999 to 2002. During that time, as I have mentioned, BHP decided to and thereafter did divest its shareholding in OTML. In 2002, Sir Mekere was succeeded as Prime Minister by Sir Michael Somare, who held office until 2011. In 2011 and 2012, Papua New Guinea was engulfed by a

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10 4AB2629; 4AB2655.

11 Plaintiff's Closing Submissions at paragraph 51.

12 Prof Ross Gregory Garnaut's AEIC at paragraphs 33–34; Certified Transcript (24 April 2018) at pp 91 (line 20) to 94 (line 21).

constitutional crisis. That crisis saw both Sir Michael and Mr Peter O'Neill claim simultaneously to be the legitimate Prime Minister of Papua New Guinea. A general election was held in July 2012 in an effort to resolve the constitutional crisis. Sir Mekere declined to seek re-election to his seat in that general election. Mr O'Neill's party won the election. He was sworn in as Prime Minister in August 2012. Prime Minister O'Neill has held office as the Prime Minister of Papua New Guinea from August 2012 to the present day.

25 Soon after the 2012 general election, at Prime Minister O'Neill's direction, the State began to investigate the manner in which PNGSDP's assets were being used. The particular concern was to ascertain whether those assets were in fact being used to benefit the people of Papua New Guinea. The State took into account the prevailing sentiment of the people of Papua New Guinea that BHP, as a foreign entity, should no longer be involved in the governance of PNGSDP and that there were suitably qualified Papua New Guineans to assume all positions of authority within PNGSDP.[13] The State therefore decided to engage BHP in negotiations on the terms of BHP's exit from PNGSDP and a restructuring of PNGSDP.[14]

26 At about the same time, PNGSDP was also in the process of reviewing its corporate constitution. In October 2012, that review culminated in the directors of PNGSDP making the first set of changes to its corporate constitution. The changes weakened the links which PNGSDP had until then had with both BHP and the State.[15]

(a) Article 24(A) of the Articles was amended to transfer the right to appoint "A" directors from BHP to the "A" directors themselves;

13 Plaintiff's Closing Submissions at paragraph 57.

14 Plaintiff's Closing Submissions at paragraph 58.

(b) Articles 37(A) and 38 of the Articles were amended to increase the requirements for a quorum and for a majority at directors' meetings to two "A" directors and one "B" director instead of one "A" director and one "B" director; and

(c) a new Clause 8A was added to the Memorandum to entrench the appointment process of the "A" directors and the requirements for quorum and majority at board meetings, such that those articles in the Articles could not be amended unless *all* members of PNGSDP agreed.

27 The chairman of PNGSDP's board of directors in 2012, and indeed since PNGSDP's inception, was Prof Garnaut. Together with these changes in October 2012, Prof Garnaut stepped down as a director of PNGSDP and as the chairman of its board. Sir Mekere was appointed to PNGSDP's board and assumed chairmanship of the board that same month.

28 With these changes in place, the negotiations then commenced between the State and BHP for BHP's exit from PNGSDP. In March 2013, Prime Minister O'Neill wrote to Sir Mekere (in the latter's capacity as chairman of PNGSDP) informing him of the State's intention to commence negotiations to purchase PNGSDP's shares in OTML.[16] He asked Sir Mekere to put together a negotiating team for PNGSDP. The negotiations commenced. Eventually, the negotiations involved BHP as well. The negotiations failed to yield an agreement.

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15 Plaintiff's Closing Submissions at paragraph 59.

16 PCB 797–798.

29 When it became apparent that the negotiations had failed, the State and PNGSDP each took unilateral action to achieve their desired outcome in the negotiations.

30 On 19 September 2013, the Papua New Guinea Parliament passed the Mining (Ok Tedi Tenth Supplemental Agreement) Bill 2013 and the Mining (Ok Tedi Mine Continuation) (Ninth Supplemental Agreement) (Amendment) Bill 2013. The effect of these two statutes was: (a) to cancel all of the ordinary shares in OTML which PNGSDP held; (b) to issue an identical number of new shares in OTML to the State; (c) to grant the Prime Minister the discretion to declare whether the State would pay compensation for these shares, and if so, to whom, in what sum and on what terms; and (d) to give the State "all necessary powers to restructure" PNGSDP.[17]

31 PNGSDP, in response, effected two further rounds of changes to its corporate constitution. In October 2013, the directors of PNGSDP appointed Sir Mekere as a member of PNGSDP, a status he was to hold concurrently with his position as a director and as chairman of the board of directors. In the same month, the members of PNGSDP resolved to delete Article 24(B) of the Articles. This removed the right of the three State agencies named in that Article to appoint "B" directors, whether afresh or as replacements for existing "B" directors. The amendment also introduced a new "fit and proper" test to assess the suitability of the existing "B" directors to hold office as a director. In March 2014, Article 24(B) was further amended to give the members of PNGSDP the right to appoint, replace and remove "B" directors.

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17 Plaintiff's Closing Submissions at paragraph 82; 9AB6554–6566.

Procedural history

32 In October 2013, the State attempted to appoint a transitional management team to take charge of PNGSDP. PNGSDP, being a company incorporated in Singapore, commenced proceedings in Singapore by way of Originating Summons 1036 of 2013 ("OS 1036") to challenge the State's attempt. In July 2014, Prakash J, as she then was, converted OS 1036 into a writ action with the State as plaintiff. That writ action is Suit 795 which has now been tried before me.

33 In April 2014, the State also sought an injunction against PNGSDP by filing Summons 1669 of 2014 ("Summons 1669") to restrain PNGSDP from dealing with, disposing of, or otherwise diminishing the value of assets belonging to PNGSDP. Prakash J heard that application and ordered an interim injunction restraining PNGSDP from changing its Memorandum and the composition of its board of directors, and removing assets in what is called PNGSDP's "Long Term Fund". Prakash J also heard the State's application for a wider injunction restraining PNGSDP from dealing with all of its assets, but dismissed that application. The interim injunction was left in place, however, until the disposal of this action. In light of my decision, that injunction must be and is now discharged. There is an open question as to whether there should be an inquiry on the State's undertaking as to damages. PNGSDP will have to make a separate application if it wishes such an inquiry to be conducted.

34 In October 2014, the State filed an application in Summons No 5440 of 2014 ("Summons 5440") seeking to compel PNGSDP to allow the State to inspect PNGSDP's accounts, books of account, and other records. Prakash J set aside Summons 5440 on the ground that the relief prayed for, being final relief, could not be sought by an interlocutory application but instead ought to have

been sought by originating process. The State responded by filing Originating Summons 234 of 2015 ("OS 234") in March 2015, seeking essentially the same relief as it had sought by Summons 5440.

35 Prakash J gave her decision on the State's application in OS 234 in February 2016. Her decision is reported as *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366 ("*PNGSDP (OS 234)*"). She held that the State had a right of inspection on the terms of Clause 9 and Article 52 of PNGSDP's Memorandum by virtue of a collateral contract, the ratification of which PNGSDP was estopped from denying. She further held that the State's right of inspection was limited only to the documents described in Clause 9 of the Memorandum.

36 PNGSDP and the State both appealed against Prakash J's decision. The Court of Appeal allowed PNGSDP's appeal on the narrow ground that the question whether the State had a right of inspection, as well as the extent of that right, on the basis of a collateral contract, was not one which could be decided summarily on an application by way of originating summons, but should be determined with oral evidence and cross-examination.[18] The Court of Appeal therefore set aside the judgment in *PNGSDP (OS 234)* and directed that the State pursue the relief sought in OS 234 in consolidation with the trial of Suit 795. OS 234 – and the question whether the State has a right of inspection in respect of PNGSDP's books and records and if so the extent of that right – is therefore also before me now.

The parties' cases

37 The essence of the State's case is that the agreement between BHP, the

[18] CA/CA28/2016.

State and PNGSDP in relation to PNGSDP's corporate governance is not set out exhaustively in the suite of written contracts but is partly set out in those written contracts and partly oral. I shall refer to this partly written and partly oral overarching agreement pleaded by the State as "the Agreement". As part of the Agreement, it was agreed between the State, BHP, and PNGSDP that the State would have certain rights of control and oversight over PNGSDP (the "Agreed Oversight Structure"), that those rights could not be changed or altered without the State's consent (the "Consent Term"), and that the State is to be entitled to enforce these rights directly against PNGSDP (the "Direct Enforceability Term").

38 The first of the State's three main contentions is therefore that this partly written and partly oral agreement exists. The evidence that it exists includes the fact that PNGSDP was ultimately incorporated on the terms set out in its constitutional documents as envisioned by the Agreement, and the fact that various other written contracts which the Agreement contemplated being entered into were indeed ultimately entered into. Further, even if it is found that Consent Term and the Enforceability Term were not agreed as express terms of the Agreement, the State submits that those terms are nevertheless implied terms of the Agreement, because they are necessary to give business efficacy to the Agreement.

39 The State's second main contention is that both the State and BHP intended PNGSDP to hold the OTML shares on a charitable trust for the purposes set out in Clause 3 of the Memorandum ("the Trust"),[19] *ie* to advance a programme of sustainable development in Papua New Guinea, and in particular for the benefit of the people of the Western Province. The Trust was

[19] Statement of Claim at paragraph 18.

constituted once BHP made a gift of its shares in OTML to PNGSDP. There was no express declaration of trust, but none is needed because there is conduct evidencing the creation of the Trust.

40 The State's third main argument depends on at least one of its first two arguments succeeding. The State argues that PNGSDP has breached either the Agreement or the Trust or both by: (a) effecting various changes to its Memorandum in contravention of the Agreed Oversight Structure; (b) failing to provide an account to the State of all its dealings with its assets, when it holds those assets for the benefit of the people of Papua New Guinea; and (c) dealing with its assets in breach of the Program Rules or in breach of PNGSDP's agreed objects.

41 The State therefore claims the following substantive relief:[20]

(a) declarations that the Agreed Oversight Structure cannot be amended without the consent of the State and BHP and that the State or BHP is entitled, acting alone, to seek a remedy against PNGSDP for a breach of the structure;

(b) a declaration that PNGSDP has acted in breach of the Agreement, in breach of the Trust or in breach of both;

(c) orders that the members' and directors' resolutions passed in October 2012 appointing Sir Mekere as director and Chairman of PNGSDP are invalid;

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[20] Statement of Claim (Amendment No 5) ("Statement of Claim") at paragraph 67.

(d) orders directing that the directors' resolution admitting Sir Mekere as a member of PNGSDP is invalid and consequently that he be removed as a member of PNGSDP;

(e) orders directing that members' resolutions passed in 2013 and 2014 amending PNGSDP's Memorandum and Articles are invalid;

(f) an order directing that PNGSDP's operations and assets should be managed or administered pursuant to PNGSDP's Memorandum and Articles in the form existing before the amendments made in or after October 2012;

(g) an order that the State be entitled to appoint three directors of PNGSDP and to appoint one of those three directors as a member of PNGSDP; and

(h) an order that PNGSDP provide the State with a full account of its dealings with its assets.

42 PNGSDP's response is threefold. First, PNGSDP denies that an Agreement was ever concluded in the form which the State alleges. Its case is that the State has failed to put forward evidence of any such Agreement, and moreover that the State's witnesses have in fact conceded that the agreement between the parties on the occasion of PNGSDP's incorporation was ultimately reduced into a suite of written contracts, leaving no scope for any aspect of the agreement to be partly oral, as the State alleges. This is supported by the fact that none of the parties involved in the negotiations was authorised to enter into purely oral agreements, and the fact that the complexity of the transaction demanded that it be documented entirely in written contracts. The State's allegations concerning the existence of the Agreed Oversight Structure, the

Direct Enforceability Term and the Consent Term are all afterthoughts and fabrications and can be contradicted or disproved by the objective documentary evidence. In particular, the fact that the State's key witness, Dr Iacob Weis, has given evidence that the parties discussed which terms of the parties' agreement were to be entrenched and therefore immutable and which were to be directly enforceable eliminates any possibility of now finding implied terms about entrenchment or enforceability.

43 Second, PNGSDP also denies the existence of the Trust. PNGSDP is neither a trust nor the trustee of a trust. It is instead a company limited by guarantee. No trust was ever declared. And it would be wholly inconsistent with PNGSDP receiving the OTML shares as a trustee for it to grant a security interest over its assets to a third party, as it was obliged to and did by the Security Trust Deed.

44 Third, because there is no Agreement and there is no Trust, no question of whether PNGSDP has breached one or both of them even arises.

45 PNGSDP therefore rejects all of the State's claims, and further brings counterclaims for:

(a) a declaration that the State's attempt to remove all of the directors of PNGSDP in October 2014 is of no legal effect, as is the State's attempt to terminate Mr David Sode's appointment as Managing Director of PNGSDP in October 2014; and

(b) a declaration that the directors of PNGSDP as appointed from time to time in accordance with PNGSDP's Memorandum and Articles

as they now stand have the full authority to manage the business of PNGSDP in accordance with corporate constitution.

Issues to be determined

46 The positions taken by the parties leave the following three main issues for me to decide:

(a) First, was there a partly oral, partly written Agreement between BHP, the State, and PNGSDP in or around late 2001 in respect of BHP's exit from OTML? And if so, what were the terms of that agreement?

(b) Second, does PNGSDP hold its assets and the dividends therefrom on the charitable Trust alleged?

(c) Third, if either the Agreement or the Trust is found to exist, has PNGSDP breached either the Agreement or the Trust?

47 Before I turn to deal with these three main issues, however, the State and PNGSDP have each raised a host of preliminary issues. Those have to be resolved at the outset, because they have a bearing on the determination of the main issues. I therefore turn to consider these preliminary issues now.

Preliminary issues

Whether the State has failed to join an essential party

48 The first preliminary issue concerns PNGSDP's submission that the State's claims fail entirely because the State failed to join BHP as a party to Suit 795, which it was obliged to do because BHP is a party to the Agreement which the State alleges to exist. PNGSDP submits that the State's case is that,

by virtue of the Agreement, PNGSDP made a single promise jointly to both the State *and* BHP.[21] It is clear that the State and BHP are joint promisees because the State's case is that the Agreed Oversight Structure vests "oversight of PNGSDP … equally between BHP and the State".[22]

49 When a promisor makes a single promise to two or more promisees jointly, one of the joint promisees cannot sue the promisor without the other joint promisees being parties to the action: *Petrie v Bury* 107 ER 764; *Cullen v Knowles and Birks* [1898] 2 QB 380. If a joint promisee refuses to be joined as a plaintiff, he must be joined as a defendant: *Johnson v Stephens and Carter Ltd* [1923] 2 KB 857. PNGSDP's position is that, on the State's own case, BHP is a joint promisee with the State but is neither a plaintiff nor a defendant in this action.

50 Separately, and as a matter of local authority, the Court of Appeal's decision in *Karahas Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 is also authority that the court may not order declaratory relief unless all parties whose interests would be affected by it are present before the court (at [14]). The State seeks declaratory relief in this action which affects BHP, but has impermissibly failed to join BHP as a party to this action. For example, the State seeks a declaration that the Agreed Oversight Structure cannot be amended "without the consent of the State and BHP".[23] PNGSDP's position is that the State's action is therefore fatally tainted by a fundamental defect: the failure to join BHP to this action.

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21 Defendant's Closing Submissions at paragraphs 68 and 71.

22 Statement of Claim at paragraph 8(c).

23 Statement of Claim at paragraph 67(1).

51 The State's response is that its case is not that PNGSDP made a single promise to the State and BHP as joint promisees. Instead, its case is that PNGSDP made two promises to the State and to BHP severally. Where a promisor makes a separate promises to more than one promisee *severally*, the law is that any one or more of the promisees is competent to bring an action against the promisor and it is not necessary to join all of the other several promisees. For this proposition, the State cites Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) at para 13-024.

52 In my view, the State's case is one of PNGSDP making separate promises to BHP and the State severally. It is true that the Agreed Oversight Structure which is alleged by the State is said to vest oversight of PNGSDP in both the State and BHP. But when seen in its proper context, it is obvious that the State and BHP have separate interests that, on the State's case, the Agreed Oversight Structure was intended to protect separately. The Agreed Oversight Structure was therefore intended to be enforceable by the State and BHP independently of each other.[24] This is also true of, for example, the Consent Term. On the State's pleaded case, the Agreed Oversight Structure would make no sense if the party whose rights had been breached would have to ask the other party, who stood to gain from the breach, for its consent jointly to enforce their rights against PNGSDP.[25]

53 As a case in point, the State cites the English High Court decision of *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 ("*Catlin*"). In that case, a husband and wife gave a mandate to a bank to honour all cheques and orders, but only if they were signed by both account holders. The bank paid

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24 Plaintiff's Reply Submissions at paragraphs 108–109.

25 Plaintiff's Reply Submissions at paragraph 111.

out money without the wife's approval. The wife sought declarations against the bank without joining her husband to the proceedings. Bingham J decided in favour of the wife. He held that although the mandate was a single document signed by each joint account holder and contained "no hint of anything other than a joint obligation", the duty must – "to make sense" – "have been owed to the account holders severally, because "the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other": at 771. The State says that the present case parallels *Catlin*.

54 I accept the State's characterisation of PNGSDP's obligations as being obligations which it owed severally to the State and BHP. It is always a question of construction whether an agreement under which a promisor undertakes an obligation to more than one promisee is a single promise made jointly to the promisees or comprises several promises made to the promisees severally. Like all questions of contractual construction, the answer ultimately depends on the intention of the parties, objectively ascertained. The best guide to ascertaining the intention of the parties is to look at the instrument itself and see what interests are intended to be protected: *Palmer v Mallet* (1887) 36 Ch 411.

55 It is clear to me that, although it is the State's case that the State and BHP were both to have control and oversight of PNGSDP together, the State and BHP have separate and divergent interests in exercising that control and oversight. For example, the State and BHP each have the right to appoint a particular category of director. It must have been intended by the parties that a breach of this right would be actionable by the relevant appointing party, acting alone. And similarly, insofar as it is the State's case that both the State and BHP have a right to inspect PNGSDP's accounts and other records, it is clear that

that right is intended to protect or advance the quite separate interests of BHP and the State. A party who obtains the accounts is able to use them to identify instances of corporate wrongdoing and mismanagement. The State and BHP, who answer to different constituencies and communities, would understandably have different interests in pursuing PNGSDP for any alleged wrongdoing. It is therefore neither inconsistent with the State's own pleaded case nor a fundamental defect, in my view, for the State to have commenced this action without joining BHP as a party to it.

56 I also do not consider that the State's case fails *in limine* simply because it seeks declaratory relief which would bind BHP even though BHP is not a party to this action. The practical consequence of that is either that the court withholds the declaratory relief from the State or cuts down the scope of any declaratory relief which is awarded by confining the relief so that BHP's position remains unaffected. But the fact that a party may ultimately not obtain the full scope of the relief it claims does not mean that its claim is, at the outset, so fundamentally flawed that it fails *in limine*.

57 On both counts, therefore, my view is that the State's claim is not fundamentally and fatally flawed simply because it has failed to join BHP to this action.

Dr Weis' affidavit evidence

58 The next preliminary issue concerns the admissibility and, if admissible the weight, of the evidence of Dr Weis, a witness for the State. The question arises in the following circumstances. Dr Weis was already quite ill when this action came on for trial.[26] Despite his illness, he gave evidence by video link

[26] Mr Daniel Rolpagarea's 38th Affidavit at pp 13–14.

from Israel, where he now lives. His cross-examination was cut short, however, when his condition deteriorated causing him to be hospitalised.[27] Sadly, Dr Weis did not recover. He passed away without completing his cross-examination and with no opportunity for re-examination.[28]

59 Dr Weis was, in several respects, the key witness for the State. He was the only witness called by the State who was present at the negotiations over BHP's exit from OTML. He was therefore the only one of the State's two witnesses who could give direct evidence, within the meaning of s 62 of the Evidence Act (Cap 97, 1997 Rev Ed), of the Agreement.[29]

60 The State relies on O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") as the relevant rule in this scenario. That rule, the State submits, gives the court the discretion to admit a witness's affidavit of evidence in chief even when the witness fails to attend trial for cross-examination. That discretion should be exercised here, with the only question remaining being the weight to be given to the parts of Dr Weis' evidence in chief on which he was not cross-examined.[30]

61 At the close of the trial, I ruled that Dr Weis' affidavits of evidence in chief were admissible, and admitted them.[31] Counsel for PNGSDP accepted that the circumstances were extenuating, and did not object to counsel for the State's submission that Dr Weis' affidavit evidence should be allowed to stand, subject to submissions on weight.[32] I took the view that, for quite obvious and

27 Plaintiff's Closing Submissions at paragraphs 132 and 134.

28 Certified Transcript (14 August 2018) at p 1 (lines 23–25).

29 Plaintiff's Closing Submissions at paragraphs 150(b) and 157.

30 Plaintiff's Closing Submissions at paragraph 146.

31 Certified Transcript (30 April 2018) at p 19 (lines 8–14).

unfortunate reasons, Dr Weis' evidence had been cut short by events which could not have been foreseen and which were beyond anybody's control. This was not at all analogous to a case where a witness failed entirely to attend for cross-examination at trial: Dr Weis had been forced by ill health to retire from the stand and prevented by death from completing his evidence. Further, Dr Weis had given evidence for two full days out of the four days originally scheduled for his testimony and had therefore given what I consider to be the bulk of his evidence on the critical issues in question in this action.

62 I made my ruling in the exercise of my discretion under O 38 r 2(1) and also in light of s 32(1)(*k*) of the Evidence Act. That provision allows an out-of-court statement to be admitted by agreement between the parties. The question of the weight given to Dr Weis' evidence will be analysed below when I come to examine the main issues in dispute.

Whether the State can rely on Sir Mekere's affidavits

63 Another evidential issue which was whether the State could rely on Sir Mekere's affidavits filed in this action. The question arises because PNGSDP chose not to call Sir Mekere as a witness to be cross-examined at trial even though he had filed affidavits of evidence in chief and even though PNGSDP had given every indication right up until the last minute that he would be attending trial to be cross-examined on his affidavits of evidence in chief.

64 The affidavits of Sir Mekere's that have been filed in this action fall into two categories: (i) affidavits which he swore for interlocutory proceedings in this action; and (ii) the affidavits of evidence in chief which he swore for the

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[32] Certified Transcript (30 April 2018) at p 16 (lines 16–25).

trial of this action. Curiously, it is the State, and not PNGSDP, who seeks to rely on Sir Mekere's affidavits in both categories.[33]

65 The State submits for several reasons that it can rely on all of Sir Mekere's affidavits, even though Sir Mekere did not testify at trial. First, because these affidavits are admissible as admissions.[34] Second, because PNGSDP's witness, Mr Charles Mercey, who did testify at trial, confirmed and adopted parts of Sir Mekere's affidavits.[35] Third, because PNGSDP is itself relying on these affidavits, having made reference to Sir Mekere's interlocutory affidavits in its written closing submissions.[36]

66 I have no difficulties with the State's second submission. Where Mr Mercey has confirmed and adopted aspects of Sir Mekere's affidavit evidence as Mr Mercey's own evidence, that evidence is undoubtedly proved and rendered admissible. But the evidence is admissible only as Mr Mercey's evidence, and not as Sir Mekere's.

67 The first and third submissions of the State, however, require closer examination. A hurdle which the State must surmount is O 38 r 2(1) of the Rules of Court:

> **Evidence by affidavit (O. 38, r. 2)**
>
> **2.**—(1) Without prejudice to the generality of Rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence in chief of a witness shall be given by way of affidavit and, unless the Court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination, and, *in*

33 Certified Transcript (14 August 2018) at p 13 (lines 15–19).

34 Certified Transcript (14 August 2018) at p 13 (lines 15–19).

35 Certified Transcript (14 August 2018) at p 13 (lines 15–19).

36 Certified Transcript (14 August 2018) at p 20 (lines 7–10).

> *default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court.* [emphasis added in italics]

The short point here is that Sir Mekere did *not* attend court to give his evidence, and the default operation of O 38 r 2(1) means that his affidavits of evidence in chief, at the very least, cannot even be received in evidence by the court. In other words, they cannot be admitted into evidence without the court's leave.

68 The State argues that Sir Mekere's interlocutory affidavits stand in a different position to his affidavits of evidence in chief. His interlocutory affidavits, not being affidavits of evidence in chief, are not caught by O 38 r 2(1). The State presumably relies on O 38 r 2(2) for support, because that rule provides that in "any application made by summons, evidence shall be given by affidavit" unless the Rules or the court so directs.

69 In my view, however, Sir Mekere's interlocutory affidavits cannot stand in a better position than his affidavits of evidence in chief. The State seeks to rely on the interlocutory affidavits at trial, and not on an interlocutory application. Any reliance on O 38 r 2(2) would therefore be misplaced.

70 Further, I cannot see why the substance of the procedural rule set out in O 38 r 2(1) requiring a witness to be available for cross-examination at trial before his affidavit of evidence in chief can be admitted at trial should not apply also to his affidavits filed in interlocutory proceedings, regardless of which party seeks to rely on these at trial. The purpose of O 38 r 2(1) is to ensure that the witness comes to court to prove by oral testimony the evidence he has set out in his affidavit of evidence in chief and to be cross-examined on it. Before the introduction of O 38 r 2(1) specifically to deal with affidavit evidence, the former rule as stated in O 38 r 1 was that the evidence of witnesses had to be

proved "by the examination of the witnesses" orally (see Jeffrey Pinsler, "A Review of Recent Amendments to the Rules of the Supreme Court" (1991) 3 SAcLJ 167 at 171). Order 38 r 2(1) was introduced simply to cater for the introduction of affidavits of evidence in chief as a more convenient and efficient means for a witness to give his evidence in chief. The evidential significance of a witness's personal attendance at court to prove his evidence was not disturbed by the amendment. Order 38 r 2(1) is simply a procedural rule which does no more than state what would in any event be the effect of the Evidence Act on any attempt to adduce an out of court statement, however formal or informally made, by a person who is unavailable to be cross-examined. Sir Mekere's affidavits of evidence in chief are therefore caught by the procedural letter of the rule, and his interlocutory affidavits by the underlying substance of the rule.

71 Proceeding on the basis that Sir Mekere's affidavits of evidence in chief and interlocutory affidavits are *prima facie* inadmissible because of his failure to attend at trial (save to the extent that Mr Mercey has adopted parts of Sir Mekere's affidavits as his own evidence), the next question is whether those affidavits are admissible on some other basis. Such other basis can be found only in the Evidence Act. Any parts of Sir Mekere's affidavits which amount to formal admissions are admissible despite his non-attendance, given that those affidavits are signed by Sir Mekere. Those parts are admissible under s 60 of the Evidence Act, which renders formal admissions admissible as proof of the facts contained in them. Any parts of Sir Mekere's affidavits which amount only to informal admissions, such as a statement made by Sir Mekere against his own interest or against PNGSDP's interest within the meaning of s 21 of the Evidence Act, are also admissible in evidence, but only at the instance of the State against PNGSDP. Section 31 of the Evidence Act provides that informal admissions, unlike formal admissions, are not conclusive of proof of the matters

which they admit. PNGSDP therefore remains entitled to challenge the truth of any informal admissions set out in Sir Mekere's affidavits.

72 The fact that PNGSDP has relied on some parts of Sir Mekere's interlocutory affidavits in its submissions, however, does not in itself render those affidavits admissible. It is true that the affidavit of a witness who fails to attend at trial may be received in evidence if the matters contained in the affidavit are not contentious: *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR(R) 382. PNGSDP relied on Sir Mekere's interlocutory affidavits only to give background information about the transaction and the events leading up to this action. The State, however, uses that reliance to argue that it is entitled to rely on other parts of the affidavits to contend that the State, BHP and PNGSDP entered into the Agreement and that there was a Trust. These, however, are highly contentious questions which lie at the heart of the present dispute. Unless those parts of Sir Mekere's affidavits amount to admissions, they are not admissible simply because PNGSDP has relied on other non-contentious parts of those affidavits in its closing submissions.

73 The result of the above analysis is that the State is entitled to rely on those parts of any of Sir Mekere's affidavits which amount to admissions, whether formal or informal; and PNGSDP is at liberty to challenge only those parts of Sir Mekere's affidavits which amount to informal admissions. Other than this, Sir Mekere's affidavits are not evidence in this action.

74 It is not productive at this point to identify the exact parts of Sir Mekere's evidence on which they State may rely in this action. It suffices to point out that this is the approach I have taken in admitting and weighing his evidence for my

decision.

Whether adverse inferences should be drawn against PNGSDP

75 The final preliminary issue concerns the State's invitation to me to draw adverse inferences against PNGSDP for choosing not to call three of their witnesses who filed affidavits of evidence in chief – Sir Mekere, Mr Lim How Teck, and Mr Donald Manoa – to testify at trial; and for refusing to file an affidavit of evidence in chief from Mr Sode despite his position in PNGSDP and the many interlocutory affidavits which he has filed in these proceedings.[37]

76 I first set out the relevant law. The Court is empowered by s 116 of the Evidence Act to presume against a party who withholds evidence that the withheld evidence would be unfavourable to that party:

> 116. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

77 The Court of Appeal recently summarised the principles governing the drawing of an adverse inference in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") at [20]:

> (a) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who

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37 Plaintiff's Closing Submissions at paragraph 167.

> might be expected to have material evidence to give on an issue in the matter before it.
>
> (b) If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.
>
> (d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If, on the other hand, a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.

78 With these principles in mind, I now turn to the parties' arguments. The State's first argument is that PNGSDP's decision not to call Sir Mekere, Mr Lim, and Mr Manoa at trial caused severe prejudice to the State.[38] PNGSDP consistently indicated that these three witnesses would give evidence at trial and would therefore be available for cross-examination. Senior Counsel for the State accordingly reserved certain lines of questioning for these three witnesses and did not pursue those lines with PNGSDP's other witnesses.[39] PNGSDP's last-minute decision not to allow these three witnesses to be cross-examined at trial therefore caught the State by surprise, ambushing the State with a "calculated decision to shield their witnesses from cross-examination".[40]

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38 Plaintiff's Closing Submissions at paragraphs 173–174.

39 Plaintiff's Closing Submissions at paragraphs 173–174; Certified Transcript (24 April 2018) at pp 3 (line 4) to 4 (line 6).

40 Plaintiff's Closing Submissions at paragraphs 173 and 198.

79 This argument does not advance the State's case for an adverse inference to be drawn. As PNGSDP rightly points out, the position in an adversarial system such as ours is that a party has the freedom to call such witnesses as it pleases and in the order that it chooses. If a party exercises that freedom but miscalculates by leaving a fundamental aspect of its case unproven, then that party bears the consequences of that miscalculation. The party may lose on that aspect of its case, and may thereby lose its case overall. But that is that party's risk to take. The court should not overbear that freedom: *Briscoe v Briscoe* [1968] P 501 at 504, followed in *Auto Clean 'N' Shine Services (a firm) v Eastern Publishing Associates Pte Ltd* [1997] 2 SLR(R) 427 at [12]–[13]. Implicit in this is that a party has no obligation to call a witness simply to assist the other party to prove its case by cross-examining that witness. Also implicit in this is that a party is free not to call a witness at trial who is listed on his witness list and who has filed an affidavit of evidence in chief. The opposing party, if properly advised (as the State undoubtedly is) will be well aware of this possibility. The fact that Senior Counsel for the State decided not to put certain lines of questioning to the witnesses who did testify at trial, even assuming he could have saved them for the later witnesses who were not called, is therefore no reason for this court to draw an adverse inference against PNGSDP.

80 The State's second argument identifies specific reasons tied to the specific witnesses whom PNGSDP chose not to call at trial to support an adverse inference being drawn. In respect of Sir Mekere, the State argues that Sir Mekere was PNGSDP's "most important witness", and "main witness".[41] As Prime Minister of Papua New Guinea from 1999 to 2002, he had overall charge of the State's position on the terms of BHP's exit from OTML.[42] As Chairman

41 Plaintiff's Closing Submissions at paragraphs 175–176.

42 Plaintiff's Closing Submissions at paragraph 184.

of PNGSDP's board from October 2012 to August 2017, he was in overall control of PNGSDP during the entire period in which the alleged breaches of the Agreement and the Trust occurred.[43] Further, the fact that Sir Mekere filed numerous affidavits in these proceedings shows that he had much material evidence to give and to be cross-examined on.[44] In particular, his affidavits suggest that he had personal knowledge of the Agreement.[45]

81 It appears that the adverse inference I am invited to draw against Sir Mekere is this: that Sir Mekere would not have been able to explain away the statements which he had so readily made on affidavit at the outset of the proceedings.[46]

82 There are two reasons why I decline to draw an adverse inference against PNGSDP for not calling Sir Mekere. The first is that an adverse inference should be drawn only where there has been a failure to call a witness whose testimony would be of superior evidential value in respect of the facts to be proved than the evidence put before the court: *Buksh v Miles* 296 DLR (4th) 608 at [30], cited with approval in *Sudha Natrajan* at [26]. As PNGSDP rightly points out, Mr Mercey is a witness who *did* give evidence for PNGSDP and who *can* give direct evidence within the meaning of s 62 of the Evidence Act of the relevant facts as far as any alleged Agreement or Trust is concerned. Mr Mercey actually participated in the negotiations, whereas Sir Mekere merely appointed the negotiating team for the State.[47] As between Sir Mekere and Mr Mercey, only Mr Mercey can give direct evidence of the negotiations in which the State

43 Plaintiff's Closing Submissions at paragraph 184.

44 Plaintiff's Closing Submissions at paragraph 185.

45 Plaintiff's Closing Submissions at paragraph 186.

46 Plaintiff's Closing Submissions at paragraph 192.

47 Defendant's Closing Submissions at paragraph 163.

alleges the Agreement was concluded and the Trust constituted. Further, I note that Sir Mekere appointed the negotiating team for *the State*. I consider that the State's case in this regard is already amply supported by having Dr Weis give evidence, seeing that Dr Weis was integral to that negotiating team.

83 If I am wrong on the above, I also consider that a separate reason for not drawing an adverse inference is that the State has simply not identified with sufficient specificity what inference it invites me to draw. The Court of Appeal in *Sudha Natrajan* at [23] indicated that although the inference to be drawn is not necessarily confined to the undisclosed evidence, the court cannot simply speculate as to what the evidence may show. The court "must put its mind to the *manner* in which the evidence that is not produced is said to be unfavourable when drawing the adverse inference under s 116(*g*)" [emphasis in original]. Thus the Court of Appeal in *Sudha Natrajan* carefully picked through the facts to identify the precise *extent* to which the evidence not given would have been unfavourable to the party who did not call the witness (at [25]).

84 Here, the State seems to suggest that Sir Mekere would have given evidence unfavourable to PNGSDP by testifying that the Agreement had been concluded. But this might not be correct. As the State itself points out, Sir Mekere in his numerous affidavits covered a wide range of topics, and could reasonably be expected to have given evidence on any one of them. It is not clear that he would necessarily have given evidence that the Agreement was concluded exactly in the form alleged by the State. I am therefore unable to determine the precise extent to which the evidence which he would have given would have been unfavourable to PNGSDP. In any event, drawing an adverse inference simply that the State's entire case is proved appears to me to be wrong in principle. It would effectively reverse the burden of proof in this action. That

burden lies on the State, as the plaintiff, to prove through its own witnesses and evidence that an agreement was in fact reached or a trust in fact created.

85 For all these reasons, I decline to draw an adverse inference against PNGSDP for not calling Sir Mekere at trial.

86 The State has also invited me to draw an adverse inference against Mr Lim How Teck and Mr Donald Manoa. Both men hold office as directors of PNGSDP. Mr Lim was appointed in January 2003 and Mr Manoa in October 2002. The State contends that both men could have given evidence regarding the breaches of the Program Rules[48] and could also have testified that PNGSDP ran its operations over its lifetime consistently with the alleged Agreed Oversight Structure.[49]

87 The State argues that PNGSDP deliberately chose not to call Mr Lim and Mr Manoa as witnesses as an exercise in damage limitation. Mr Philip James Bainbridge, PNGSDP's current chairman, gave evidence as scheduled before both of them. The State says that Mr Bainbridge was "thoroughly discredited" on the stand when cross-examined about a worthless investment. Mr Lim, as chairman of the Audit Committee and the Investment and Finance Committee, would have been hard-pressed to explain the transaction. PNGSDP therefore chose not to call him because it knew that the transaction was indefensible.[50] Mr Manoa, too, would have been unable to explain the transaction.

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48 Plaintiff's Closing Submissions at paragraph 203.

49 Plaintiff's Closing Submissions at paragraphs 204–205.

50 Plaintiff's Closing Submissions at paragraphs 201–203.

88 I decline to draw an adverse inference against PNGSDP for not calling Mr Lim and Mr Manoa as witnesses. As made clear in *Sudha Natrajan* at [20], no adverse inference need be drawn if the reason for the witness's absence or silence can be explained to the court's satisfaction. Here, I accept PNGSDP's explanation that Mr Lim and Mr Manoa were not called because a significant part of their evidence had already been covered by other witnesses, such as Mr Bainbridge.[51] To the extent that Mr Bainbridge's evidence was "thoroughly discredited", the State can hardly complain that PNGSDP made no attempt to remedy the discredit.

89 The State has also invited me to draw an adverse inference against PNGSDP for not having called Mr David Sode as a witness. Mr Sode is currently a director of PNGSDP, and was chief executive officer of PNGSDP from March 2008 to April 2016. I decline to draw an adverse inference. The State's aim in having Mr Sode give evidence, if he had been called to the stand, was to cross-examine him with regard to the Frontier Resources investment. Mr Panganai Daniel Mangwayana, who has served as PNGSDP's Financial Controller for approximately six years, and who did give evidence, was more than adequately informed to give evidence on the transaction.

Issue 1: the existence of the Agreement

90 I come now to consider the first, and the most heavily contested, of the main issues before me in this dispute. This concerns the State's argument that there exists a partly oral, partly written Agreement which includes amongst its terms the Agreed Oversight Structure, the Direct Enforceability Term, and the Consent Term.

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[51] Defendant's Closing Submissions at paragraphs 168–169.

The Agreement

91 I start with the State's pleaded case. The State's pleads that the State and BHP reached the Agreement in or around October 2001, *before* PNGSDP was incorporated.[52] In reaching the Agreement, the State was represented by Mr Koiari Tarata, Mr Iacob Weis, Mr Kuma Aua and Mr Graeme Hancock; and BHP was represented by Mr Graham Evans, Mr Gary Evans, and Mr Bill Smith. The State and BHP contracted on behalf of themselves, and also on behalf of PNGSDP. In other words, the State's case is that PNGSDP is itself a party to the Agreement.

92 The terms of the Agreement are partly captured in various documents, including PNGSDP's Memorandum, Articles and the Program Rules. These comprise the written component of the Agreement.

93 The Agreement is *evidenced* by the incorporation of PNGSDP on the terms of its constitutional documents, the Ninth Supplement Act, the Master Agreement, and the various security deeds and deeds of indemnity.

94 A principal term of the Agreement is that BHP would gift its shares in OTML to PNGSDP to hold those shares for the benefit of the people of Papua New Guinea, and to use its assets to advance a programme of sustainable development in Papua New Guinea and in the Western Province.[53]

95 The principal terms of the Agreement pleaded by the State which are most relevant to this dispute include the Agreed Oversight Structure, the Direct Enforceability Term and the Consent Term. The State pleads that the Agreed

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52 Statement of Claim at paragraph 7.

53 Statement of Claim at paragraph 8(b).

Oversight Structure is a principal term of the Agreement.[54] The Direct Enforceability Term and the Consent Term, on the other hand, are either implied terms of the Agreement or terms which can be drawn out of the Agreement by a contextual interpretation of the constitutional documents.[55] These two terms are ancillary to the Agreed Oversight Structure in the sense that they depend on the Agreed Oversight Structure being found to exist. The effect of the Direct Enforceability Term is to give BHP and the State each a (separate) right to enforce the Agreed Oversight Structure directly against PNGSDP. The effect of the Consent Term is to prohibit PNGSDP making unilateral amendments to the Agreed Oversight Structure. Put that way, it is clear that these two ancillary terms have no independent existence. They cannot exist unless the Agreed Oversight Structure is found to exist in the first place.

96 The State's case is that the Agreement is binding on PNGSDP as a pre-incorporation contract which it duly ratified upon incorporation.[56] The actions of PNGSDP which evidence ratification of the Agreement include its entry into the Master Agreement, the security deeds and the indemnity deeds; and PNGSDP's general pattern of post-incorporation compliance with the Articles and the Program Rules.

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54 Statement of Claim at paragraph 8(c).

55 Statement of Claim at paragraph 9.

56 Statement of Claim at paragraph 9A.

The Agreed Oversight Structure

97 The State particularises the details of the Agreed Oversight Structure in its pleadings as follows. The Agreed Oversight Structure reflects the parties' agreement that oversight of PNGSDP was to vest equally in BHP and the State.[57] In particular, the Agreed Oversight Structure provides that:[58]

(a) the members, directors and staff of PNGSDP are to report to, and are accountable to, both BHP and the State;

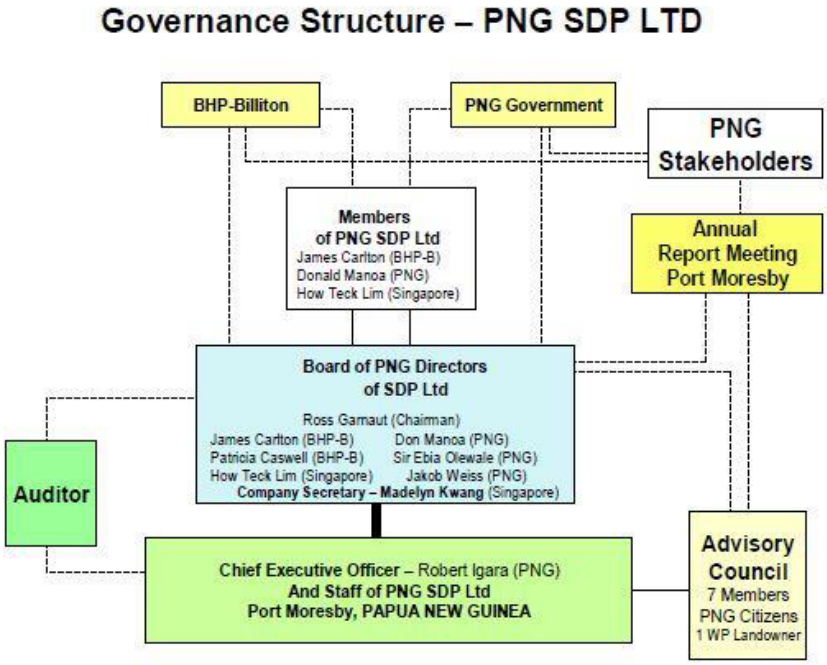
(b) the right to appoint PNGSDP's members and its directors is divided equally between BHP and the State; and

(c) BHP and the State are entitled to information about PNGSDP and to have access to its books of account, accounting records and other records.

57 Statement of Claim at paragraph 11.

58 Statement of Claim at paragraph 13.

98 Evidence of the Agreed Oversight Structure can also be found in various organisational charts in PNGSDP's Annual Reports for Financial Years 2002 to 2011, which have been depicted in substantially the same manner as follows:



99 The State also pleads that the existence of the Agreed Oversight Structure is borne out in various provisions of PNGSDP's constitutional documents, in particular in Clauses 8 and 9 of the Memorandum, in Articles 24, 37 and 52 of the Articles and in Rules 4.2 and 20 of the Program Rules.

The Direct Enforceability Term

100 The State pleads that the Direct Enforceability Term exists either as an implied term of the Agreement or as a term which can be drawn out of the Agreement by a contextual interpretation of PNGSDP's constitutional documents.[59] The effect of the Direct Enforceability Term is to ensure that each

of BHP and the State may, acting alone, pursue PNGSDP directly to secure a contractual remedy for any breach by PNGSDP of the Agreed Oversight Structure. Such a term must exist because, unless the State and BHP each have the legal means acting alone to enforce the Agreed Oversight Structure directly against PNGSDP, the rights granted to BHP and the State under the Agreed Oversight Structure – such as the right to appoint members and directors, or the right to inspect PNGSDP's books – would be meaningless.

The Consent Term

101 The State also pleads that the Consent Term exists as an implied term of the Agreement, or can be drawn out of the Agreement by a contextual interpretation of the constitutional documents.[60] Such a term must exist to ensure that the Agreed Oversight Structure is not defeated or undermined by the unilateral acts of either the State, BHP or PNGSDP.

The State has failed to prove the Agreement

102 I turn now to consider the parties' arguments. The parties make extensive and lengthy submissions on this particular issue, not all of which meet. The State does not enumerate its submissions, but it is not a mischaracterisation to say they are numerous. PNGSDP, for its part, identifies "seven main planks" why the Agreement does not exist. Each party also attempts to marshal the facts and align them into neat narratives – or indeed, theories – to explain why the Agreement must or cannot exist, which I have summarised above at [4] and [6].

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59 Statement of Claim at paragraph 14A.

60 Statement of Claim at paragraph 16.

103 The State, as the plaintiff, bears the burden of proving its case and therefore of proving that the Agreement exists. The State must prove that the Agreement exists on the evidence available as to the parties' intention, objectively ascertained, in or around October 2001. The focus of the inquiry is therefore on what the parties' objective intention was at that time, so far as that intention can be ascertained *from the evidence*. The focus is not on what the parties objectively *must have* intended. *A fortiori*, the focus is not on imputing an objective intention to the parties with hindsight.

104 I hold that the State has failed to discharge its burden of proof to show that the Agreement exists. I therefore find that there is no Agreement. I will now go through the parties' arguments to explain why this is so. I begin with the evidence given by the witnesses before turning to the circumstantial evidence.

Sir Mekere's affidavit evidence

105 The State devotes a lengthy portion of both its written and oral closing submissions to reciting extracts from Sir Mekere's interlocutory affidavits and affidavits of evidence in chief. The State says that all of these extracts constitute admissions by Sir Mekere that the Agreement exists. According to the State, Sir Mekere repeatedly acknowledges in his affidavits that PNGSDP's structure was specifically agreed, and was enforceable both by and against the State, and, for that matter by BHP.[61] The State says that these are significant "concessions" made by Sir Mekere, all the more important because Sir Mekere was Prime Minister at the time and would therefore be best placed to explain the State's position and understanding in respect of the negotiations and the Agreement.[62]

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61 Plaintiff's Closing Submissions at paragraphs 220–233.

62 Plaintiff's Closing Submissions at paragraphs 216–217.

106 I find that these extracts are of no assistance to the State. As I indicated above at [73], those parts of Sir Mekere's affidavits which constitute admissions against PNGSDP's interest are admissible against PNGSDP. However, I find it difficult to see how the parts of Sir Mekere's affidavits on which the State relies constitute admissions against interest. To my mind, Sir Mekere's statements are neutral in nature, at most, and were observations made at a high level of generality in order to illustrate PNGSDP's background. These statements are not evidence of historical fact from 2001.

107 It would be unwieldy to set out in full all of the extracts from Sir Mekere's evidence on which the State relies. I therefore go through only a selection of the more important extracts.

108 The first extract the State relies on is taken from Sir Mekere's first affidavit filed in support of OS 1036. Sir Mekere says that in that application, PNGSDP seeks "certain declarations and consequential injunctive relief as against [the State] … to ensure that all actions purportedly taken in relation to [PNGSDP] and/or on behalf of [PNGSDP] are properly authorised, lawful and consistent with [PNGSDP's] Memorandum".[63] The State says that in this affidavit Sir Mekere effectively acknowledges that PNGSDP and the State are "parties to an agreement… which could be enforced against each other".[64]

109 I cannot accept this submission. It is not apparent to me that Sir Mekere, by using these words, was admitting the existence of an agreement between the State and PNGSDP that the State could enforce the provisions of PNGSDP's Memorandum against PNGSDP. Further, even taking the State's case at its

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63 Sir Mekere Morauta's 1st Affidavit (27 October 2013) at paragraph 9.

64 Plaintiff's Closing Submissions at paragraph 222.

highest, it is not clear that the natural inference to be drawn from Sir Mekere's statement is that an overarching Agreement exists *independently* of the Memorandum and Articles that PNGSDP was seeking to enforce. An equally plausible inference is that Sir Mekere was trying to support PNGSDP's attempt to enforce its Memorandum and Articles against the State, which is wrong in law. Sir Mekere is, after all, a layperson, and may therefore have been misinformed as to the law that a company's Memorandum and Articles cannot confer rights or create obligations binding on non-members: *Malayan Banking Ltd v Raffles Hotel Ltd* [1965–1967] SLR(R) 161. Indeed, the State in its own submissions also appears to think that PNGSDP had commenced OS 1036 "to enforce the terms of the [Memorandum & Articles] against the State", and not to enforce a separate overarching Agreement.[65]

110 The State relies on another example from the same affidavit. Sir Mekere says the following:

> 54. … In particular **[PNGSDP's] governance structure is specifically intended to guard against** illegal or inappropriate investments or wrongful use of money in the Development Fund and the [Long Term Fund]:
>
> > (a) the relevant Papua New Guinea legislation at the time and the **Memorandum and Articles of Association of [PNGSDP], including the Program Rules, were all designed to promote accountability and transparency in the management and operation of [PNGSDP]**.
>
> …
>
> 55. **The structure of [PNGSDP] was therefore designed specifically** to protect the money in the Development Fund and the [Long Term Fund] …
>
> [emphasis in submissions]

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65 Plaintiff's Closing Submissions at paragraph 225.

111 The State emphasises in its arguments that the structure of PNGSDP was carefully designed to promote accountability and transparency. The implication apparently is that the structure must be permanent, or at least immutable unless the parties agree. But catchwords and labels such as "accountability" and "transparency" do not amount to a legal argument that there is an Agreement that the structure would be permanent. Further, it certainly does not help the State's case that when Sir Mekere particularises PNGSDP's safeguards in the governance structure in the above extract, he references PNGSDP's Memorandum, Articles and the Program Rules and how these were designed to promote accountability and transparency in the management and operation of PNGSDP. There is no allusion to a separate, overarching Agreement at all.

112 The State also refers to Sir Mekere's second affidavit filed to resist Summons 1669. This time, the State relies on a lengthier extract, which I have reproduced in full:[66]

> 48. After much discussion and consideration, it was ultimately decided by both the State and BHPB that [PNGSDP] should be structured as an independent company incorporated in Singapore, for a number of reasons.
>
> 49. One of the main reasons for this was to ensure the corporate integrity and stability of [PNGSDP]. I was, in my capacity as the Prime Minister at that time, involved in the negotiations.
>
> 50. I recall that both BHPB and I were aware that the persons running the State (through its Government) would inevitably change, and one of the concerns we had was to ensure the independence of [PNGSDP] and to safeguard [PNGSDP] and its assets, should the State (under the control of any future Government) attempt to use the funds for purposes other than those for which [PNGSDP] was incorporated …
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> …

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66 Sir Mekere Morauta's 2nd Affidavit in SUM1669/2014, cited in the Plaintiff's Closing Submissions at paragraph 232.

52. Incorporating in Singapore also meant that [PNGSDP] would be governed by the relevant Singapore laws, which were also transparent and predictable:

> (a) The structure of [PNGSDP] was, after lengthy discussions, specifically set up in the manner that it was in order to protect the money in the Development Fund and the LTF so that it would remain available for the benefit of the people of PNG and in particular the Western Province.
>
> (b) However, even the most well-designed structure would be useless if there were no way to ensure that it would be complied with and strictly enforced. Incorporating [PNGSDP] in Singapore was therefore the logical choice because it meant that [PNGSDP] and its officers could have immediate recourse to the Singapore Courts to ensure that international best standards of corporate governance could be robustly enforced, if necessary. Further, the stability of Singapore's legal and financial system was attractive to the parties given that it was contemplated that [PNGSDP] would be in existence and would continue operating decades after Mine Closure.
>
> …

D. Safeguards through [PNGSDP's] structure, objects and corporate governance

57. As I explained above, [PNGSDP's] structure was specifically designed to safeguard its assets, objects and corporate governance and to protect the money in the Development Fund and the LTF.

58. I will elaborate on the various safeguards implemented below.

59. First, at the formulation of [PNGSDP], the M&A, which was specifically agreed by the State and BHPB, contained safeguards to ensure that funds from OTML would be used to promote sustainable development within, and advance the general welfare of the people of, PNG, particularly those of the Western Province (see article 3(i) of [PNGSDP's] Memorandum):

> (a) In this regard, [PNGSDP's] objects in its M&A expressly include, among other things, carrying out a program known as the "PNG Sustainable Development Program" in accordance with the Program Rules.
>
> (b) Notably, the M&A, in accordance to which [PNGSDP] is obliged to conduct itself, places a particular emphasis

> on strong governance mechanisms, accountability and transparency.
>
> 60. Second, in addition to the above, [PNGSDP's] governance structure is specifically intended to promote transparency and accountability. In this regard, [PNGSDP's] Memorandum provides that the Articles of Association of [PNGSDP] "shall not be altered so as to amend the Program Rules in any respect without the prior approval in writing of (i) BHP…; and (ii) the [State]. The Program Rules includes provisions on good governance, transparency and accountability and on how both the Development Fund and LTF are to be invested:
>
> …
>
> > (*h*) The State had also reflected its support for the principles of good governance and independence set out in [PNGSDP's] M&A when it enacted the Ninth Supplemental Agreement Act …

113 The State's basic points, and my analysis of those points, remain largely the same. First, the State emphasises that the structure of PNGSDP was deliberately designed to protect the monies in the Development Fund and the Long Term Fund. I agree that that is what this extract says. I would even agree that that was the parties' contemporaneous intention in October 2001, objectively ascertained. But the extract says nothing directly, or even by allusion, about an overarching Agreement incorporating an oral agreement that that structure would be set in aspic and immutable. Much less does the extract explain how that can be the case if the constitutional documents themselves envisage and allow the structure to be changed.

114 Second, the State points out that Sir Mekere recognised the importance of safeguards, in that "even the most well-designed structure would be useless if there was no way to ensure that it would be complied with and strictly enforced". It is, of course, impossible to disagree with a statement pitched at such a high level of generality. I am also quite prepared to accept that that was the parties' contemporaneous intention, objectively ascertained. Indeed,

commercial logic and common sense, if nothing else, compel me to agree with it. But Sir Mekere goes on to identify the specific safeguards. Nothing in what he says suggests anything along the lines of the Agreement, incorporating the Agreed Oversight Structure, the Direct Enforceability Term or the Consent Term. Instead, Sir Mekere elaborates on the specific safeguards which the parties intended. This includes the Memorandum and Articles being drafted deliberately to ensure a "particular emphasis on strong governance mechanisms, accountability and transparency". This includes incorporating PNGSDP in Singapore so that the parties can have resort to Singapore's courts in the event of a dispute. This includes the objects expressly defined in the Memorandum. This includes the provision preventing the Memorandum and Articles from being amended so as to alter the Program Rules.

115 The result of the above analysis is that the State appears to be putting far more weight on the meaning of Sir Mekere's words than they can justifiably bear. Certainly, nothing in his affidavits goes as far as admitting or conceding an Agreement of the sort alleged by the State, incorporating an oral agreement to have in place an elaborate Agreed Oversight Structure reinforced and supported by the Direct Enforceability Term and Consent Term.

Mr Charles Mercey's evidence

116 The State also places great reliance on the evidence which Mr Charles Mercey gave for PNGSDP. Mr Mercey was formerly a merchant banker with Rothschild.[67] In October 2000, Rothschild was appointed by OTML to assist it and its shareholders in reaching agreement amongst themselves regarding the future of the Ok Tedi mine, and the basis on which BHP would exit as a shareholder and manager of the mine.[68] Mr Mercey was appointed to lead the

67 Mr Charles Mercey's AEIC at paragraph 1.

Rothschild team in facilitating the discussions between the shareholders, and in particular between the State and BHP.[69] He therefore gave direct evidence of the negotiations within the meaning of s 62 of the Evidence Act.

117 The State submits that Mr Mercey's evidence is important in two main regards.

118 First, the State says that Mr Mercey adopted as his own evidence the statements made by Sir Mekere in his affidavits. I have examined those statements above, and found that they do not assist the State when they originate from Sir Mekere. They do not assist the State simply because Mr Mercey adopts them.

119 Second, the State also relies on evidence given by Mr Mercey concerning a "deal" that was struck before PNGSDP was incorporated. The State says that Mr Mercey's "deal" is in fact the Agreement, although, as I show below, it has not always adopted a consistent position even on this point.[70]

120 Mr Mercey's evidence is that, in September 2001, "a deal [was] struck" at a meeting at BHP's headquarters.[71] The "deal" was then reflected in a document titled "OTML reorganisation – summary of agreements reached as at 13 September 2001" ("Summary of Agreements").[72]

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68 Mr Charles Mercey's AEIC at paragraph 4.

69 Mr Charles Mercey's AEIC at paragraph 7.

70 Plaintiff's Reply Closing Submissions at paragraphs 40–41.

71 Mr Charles Mercey's Supplementary AEIC at paragraph 22.

72 2AB1312.

121 It is apparent from the Summary of Agreements that the "deal" cannot be the Agreement. As the State itself recognises in its Closing Submissions, the intention at this point was for BHP to transfer only 90% of its shareholding in OTML to a special purpose vehicle.[73] BHP had yet to commit to divesting 100% of its shareholding. But it is a principal term of the Agreement pleaded by the State that BHP's *entire* shareholding be divested.[74] Thus the State took the position in its Closing Submissions that it was "[s]ometime after the "deal" was struck [in]… September 2001, and on or prior to 18 October 2001", when PNGSDP was incorporated, that parties also agreed that BHP "would transfer all (instead of 90%) of its shareholding in OTML" [emphasis omitted].[75] Mr Mercey's "deal" therefore cannot be the State's Agreement, Their terms are simply not the same.

122 The State, however, inexplicably appears to have resiled from this position in its Reply Closing Submissions. There, the State refutes PNGSDP's allegations that the "deal" was merely an agreement to agree by stating that this "disregards the evidence of its own witness, Mr Mercey, that the parties had, after extensive discussions for about a year, reached an (oral) agreement (struck a 'deal') as reflected in the September 2001 Summary of Agreements (which they subsequently sought to reflect in writing)".[76] The State has chosen not to refer to this September 2001 oral agreement as the "Agreement", but it is evident from these submissions that it can be none other. The State points out, for example, that the decision of Papua New Guinea's National Executive Council ("NEC") dated 22 September 2001 endorsed "the Agreement" reached and

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73 Plaintiff's Closing Submissions at paragraph 19.

74 Statement of Claim at paragraph 8(b).

75 Plaintiff's Closing Submissions at paragraph 21.

76 Plaintiff's Reply Closing Submissions at paragraph 40.

instructed that legislative amendments be carried out to "*give effect* to the Agreement reached" [emphasis added].[77] This language, the State says, indicates that a binding agreement had already been reached before 22 September 2001.[78] In the circumstances, I consider that this cannot mean anything other than the pleaded Agreement.

123 I cannot accept that Mr Mercey's evidence about the "deal" is evidence that the parties entered into the Agreement as alleged by the State. I say this for several reasons. The first, which the State itself recognises in its original Closing Submissions, is that the "deal" simply does not reflect the terms of the pleaded Agreement. That alone suffices to dispose of this argument.

124 The second is that Mr Mercey's evidence is simply too slender a basis on which to find that the parties agreed orally to the oral aspects of the Agreement. The State's case hinges on the use of the word "deal". But the word "deal" was never used by Mr Mercey in so careful and deliberate a manner as the State seems to suggest. In his supplementary affidavit of evidence in chief, Mr Mercey says it was the "essence of the deal" which had been struck by September 2001.[79] But it was his understanding that this was not an oral agreement, and he explicitly says so, by stating that he was "confident that – apart from those subsequently documented – no oral understandings were reached during the 12/ 13 September 2001 meetings (since [he] was present throughout the discussions)".[80] Indeed, he explicitly affirms elsewhere in the same affidavit of evidence in chief that "the parties had never intended to, and

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77 Plaintiff's Reply Closing Submissions at paragraph 45.

78 Plaintiff's Reply Closing Submissions at paragraph 45.

79 Mr Charles Mercey's Supplementary AEIC at paragraph 22.

80 Mr Charles Mercey's Supplementary AEIC at paragraph 19.

did not reach a legally binding oral agreement at any time prior to the signing of the written agreements".[81]

125 Mr Mercey's position did not shift under cross-examination. Mr Mercey was not cross-examined on whether he used the word "deal" to refer to what was only an informal understanding, or to what amounted to a *legally binding oral agreement*, which is the standard at which the State has pitched the Agreement. Mr Mercey did testify he believed the deal had reached a sufficient level of "certainty" and "finality" as would allow the negotiating teams to report back to their respective principals – the NEC on behalf of the State, and BHP's board for BHP – for approval.[82] But that adds no clarity as to whether the deal in this more certain or final form was a legally binding oral agreement or not. Indeed, I note Senior Counsel for the State referred to the "deal" as a "settlement" or "consensus" interchangeably, and Mr Mercey agreed with those other labels.[83] A "consensus", however, is several steps away from a legally binding agreement, both commercially and legally.

126 I appreciate, of course, that Mr Mercey is a layman and not a lawyer. He is unlikely to be alive to the fine but important legal distinction between a binding oral agreement and a mere informal consensus. Further, the question whether there was ever a legally binding oral agreement in the form of the pleaded Agreement is, of course, the ultimate question in this action. It is a legal question and one for the court to decide, not for the witnesses to testify to. But to my mind, it is significant that the State has hung so much of its case on Mr Mercey's testimony that it is necessary also to examine exactly what Mr Mercey

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81 Mr Charles Mercey's Supplementary AEIC at paragraph 21.

82 Certified Transcript (17 April 2018) at p 57 (lines 14–20).

83 Certified Transcript (17 April 2018) at p 57 (lines 14–20).

said in his evidence, as I have just done. And the point that Mr Mercey is a layman and not a lawyer cuts both ways. By using the word "deal", Mr Mercey could equally be testifying to the fact that a legally binding agreement had been entered into as he could be testifying to the fact that only an informal understanding had been reached. One therefore cannot read too much into his words, or seek to place on his words a weight greater than their meaning understood in context can bear. As the Court of Appeal stated in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*Wong Hua Choon*") at [41], "where the witnesses themselves are not legally trained, counsel ought not … to forensically parse the words they use as if they were words in a statute". In my judgment, Mr Mercey's testimony adds nothing to the State's case that the Agreement exists.

127 Third, there are difficulties with respect to the timing. The time when the "deal" was struck is quite some time before the time the State pleaded that the Agreement was entered into. I develop on this last point in greater detail below at [142]–[156].

128 Fourth, it is difficult to see the "deal" as a freestanding, legally binding agreement as opposed to a non-binding agreement, and even then only in principle. Mr Mercey's evidence was that the "essence of the deal" had been struck by that last meeting in September 2001, but the deal still had to be taken back to the principals for approval.[84] Thus, he said that the NEC approved the deal on behalf of the State on 22 September 2001 and BHP's board approved the deal on behalf of BHP on 15 October 2001.[85] Unlike *Wong Hua Choon*, this is not a case where approvals had to be obtained for internal purposes only and

84 Mr Charles Mercey's Supplementary AEIC at paragraph 21.

85 Mr Charles Mercey's Supplementary AEIC at paragraphs 21–22.

this was known only to the side needing to obtain the approvals (see *Wong Hua Choon* at [61]). Instead, Mr Mercey's evidence was that Dr Weiss had, in the course of negotiations, expressed his frustration that BHP's representatives at the various meetings appeared to "lack … authority to agree to anything without referring the matter back to senior management".[86] For his part, Dr Weis disagreed that he expressed frustration, but confirmed in his own evidence that he knew that BHP's representatives required approval from BHP's board to enter into legally binding agreements:[87]

> Q: Certainly you would know that the members of the BHP team, negotiating team, would not themselves have authority to enter into a legally binding arrangement without reference to the board of BHP or the BHP entities? You knew that, didn't you?
>
> A: I -- yes.

129 To my mind, the fact that approvals still had to be sought on both sides suggests that what had been achieved when Mr Mercey's "deal" was struck, at absolute most, was an informal consensus or understanding that would have to be formally approved at higher level before it could become legally binding.

Dr Iacob Weis' evidence

130 Thus far, I have dealt with the evidence of two of PNGSDP's key witnesses. I now turn to consider the evidence of the State's key witness, Dr Iacob Weis. Dr Weis was an advisor to the Central Bank of Papua New Guinea at the time BHP expressed its desire to exit OTML.[88] Sir Mekere appointed Dr Weis to be a member of the State's team negotiating BHP's exit from OTML.[89] He is the sole witness from the State who is able to give direct

86 Mr Charles Mercey's Supplementary AEIC at paragraph 20.

87 Certified Transcript (3 April 2018) at p 188 (line 23) to 189 (line 3).

88 Dr Iacob Weis' AEIC at paragraph 10.

evidence of the negotiations within the meaning of s 62 of the Evidence Act. He is therefore the sole witness from the State who can give admissible evidence on whether the parties' agreement was partly oral.

131 Dr Weis' evidence in chief is that joint oversight of PNGSDP by the State and BHP was "fundamental" to the parties' agreement. He indicates that it was "envisaged and understood that the structure of PNGSDP and [its constitutional documents] cannot be amended without the consent of *both* BHP and the State" [emphasis in original].[90] As PNGSDP rightly points out, however, nowhere does Dr Weis in his affidavits of evidence in chief make any reference to the parties' agreement being partly oral.

132 The question whether the State, BHP and PNGSDP had ever entered into partly oral agreement was the subject of vigorous cross-examination by PNGSDP's counsel, Mr Philip Jeyaretnam SC. Dr Weis did not, however, testify clearly that the parties reached an oral agreement in the course of their negotiations. Dr Weis' first answer when asked about agreements concerning the governance of PNGSDP was to refer only to the written contracts:[91]

> Q: Relating to the governance of PNGSDP, was there any agreement between BHP and the State and PNGSDP other than simply those written documents? I'll leave aside whether they can constitute an agreement. But other than those written documents, was there any other agreement, any letter, any spoken conversation which you are saying is an oral agreement?
>
> A: Agreements that I mentioned are the ones that I just stated, commerce agreements, there's the [programme] rules, there was the MA [*ie*, Memorandum] and the AA

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89 Dr Iacob Weis' AEIC at paragraph 10.

90 Dr Iacob Weis' AEIC at paragraph 18; see also Dr Iacob Weis' Supplementary AEIC at paragraph 6.

91 Certified Transcript (3 April 2018) at pp 133 (line 22) to 134 (line 6).

[*ie*, Articles].

133 Dr Weis did later give evidence which suggested that the State and the BHP negotiating teams had come together and agreed orally that the State and BHP could directly enforce PNGSDP's constitutional documents. This evidence, however, was almost immediately cast in doubt by his evidence that the parties intended to give BHP and the State this right by drafting a separate written contract, the Program Company Agreement ("PCA"). As matters turned out, the PCA was never executed. The PCA therefore does not form a part of the suite of written contracts between the parties. Neither party in this action suggests that the PCA is binding or seeks to enforce the PCA.

134 I set out the relevant parts of Dr Weis' evidence below:[92]

> Q: Dr Weiss, you are not then referring to any particular conversation that you or anybody else in the negotiating team had with the negotiating team for BHP in which it was agreed that the State of PNG and BHP could directly enforce the terms of the memorandum and articles of association, including the program rules?
>
> A: No, we had the full understanding that the State and BHP would fully enforce those documents.
>
> Q: Dr Weiss, this is important to me, so your last answer is -- I think I know what you mean, but it's potentially ambiguous. So if I could just ask you, do you agree that there was no conversation in which this was agreed?
>
> A: There were many times when we discussed it, it was agreed between the State and the BHP Billiton team those documents will be enforced and no question that both the State and BHP Billiton will take responsibility that they are fully adhered to.
>
> Q: Is there a reason why nowhere in this affidavit nor in your supplementary affidavit, you have set out any such conversation?
>
> A: I will now refer to an agreement which was prepared by

92 Certified Transcript (3 April 2018) at pp 135 (line 2) to 136 (line 6).

> the BHP Billiton lawyers and was supposed to be signed by the parties which is a program company agreement which, for some reason, which I cannot now recollect, it was not signed.
>
> The program company agreement was prepared by BHP Billiton lawyers and clearly indicates those agreements were supposed to be signed and enforce the rules, the MA [ie, Memorandum] and the AA [ie, Articles]. It was whatever was agreed in those documents.

135 Dr Weis made multiple references to the unsigned PCA in his evidence. It was apparent to me that, as far as he was concerned, both then and now, the principal terms of the pleaded Agreement were captured in the PCA. In particular, Dr Weis gave evidence that it was never his intention, as a member of the State's negotiating team, to have agreements which were made only orally:[93]

> Q: Your aim was to reach an agreement with BHP on behalf of -- you acting on behalf of the State that would then be authorised and executed in writing by representatives of BHP, the State and indeed other parties. Correct?
>
> A: Correct.
>
> Q: Your aim was not to do a deal on a handshake and an oral discussion, right?
>
> A: (Witness nods).
>
> Q: You nodded your head. You need to answer. Dr Weis, do you agree? Your aim was not to do a deal on a handshake and an oral discussion?
>
> A: It -- it is right and we had the program company that's supposed to put the basic agreements in writing.

Dr Weis later explained that this last answer was a reference to the PCA.[94]

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93 Certified Transcript (3 April 2018) at pp 160 (line 25) to 161 (line 12).

94 Certified Transcript (4 April 2018) at p 17 (lines 16–18).

136 Similarly, Dr Weis was directed in cross-examination specifically to consider his affidavit evidence that the State and BHP could jointly direct PNGSDP's directors or members to make changes to the Agreed Oversight Structure and his evidence that "it was assumed" that the directors and members would have to comply.[95] His evidence concerning how the parties agreed on this term is of the same tenor with his evidence concerning the Agreement as a whole, and indeed, exemplifies it:[96]

> Mr Jeyaretnam: … Dr Weis, I will continue with this topic of the discussion of the joint instruction from BHP and State of PNG to PNGSDP that you have said was discussed not just within the State team, but also across the table with the BHP team.
>
> Following this discussion across the table, was an agreement reached between the State and BHP?
>
> A: It was an understanding that everyone around the table was clear and accepted it.
>
> Q: So it was discussed, but you didn't actually come even to an oral agreement about it?
>
> A: The *only place* that it is incorporated is in the public -- program company agreement.
>
> [emphasis added]

137 Dr Weis emphasised the PCA again when he was referred to the Heads of Agreement dated 29 June 2001, a document summarising the state of the parties' negotiations at that point. A paragraph in the Heads of Agreement states that "[l]egally binding arrangements will be entered into once the outstanding issues are resolved; however no party will be liable for failure to enter into legally binding documents".[97] Dr Weis did not agree that all the arrangements would ultimately be documented; to him, some could be made orally. But when

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95 Certified Transcript (3 April 2018) at p 166 (lines 6–18).

96 Certified Transcript (3 April 2018) at p 168 (line 20) to 169 (line 7).

97 2AB1234.

pressed further, he fell back on insisting that the arrangements *were* documented – in the PCA:[98]

> Q: Earlier you did accept that your aim was not to do a deal on a handshake and an oral agreement. So all I'm really suggesting to you is that when you look at this paragraph, it reflects that that was not just your -- not your aim, but that everybody wanted everything to be in writing.
>
> A: The governance agreements that are in writing, they are talking about the rules, talking about the MA [ie, Memorandum] and the AA [ie, Articles].
>
> Q: Yes, I know there are some documents in this case, of course. Indeed what we say is that those documents represent what was agreed to the extent that they are agreed, and are agreed by the parties to those documents and where there are no parties to those documents, they have effect internally.
>
> But that is not my question. My question is: all the parties initialled this and it represented that the aim of all the parties, not just the State, not just you yourself personally, but everybody, wanted to work towards legally binding arrangements and there is the word here "document", so legally binding arrangements in writing, not legally binding arrangements that were just oral. Agree or disagree?
>
> A: I must say that we had a legal binding document that is not signed, it is a program company agreement which states what was agreed between the parties.

138 When Dr Weis was asked to elaborate further on the face-to-face meetings where oral agreements were purportedly made, his answer was that all the agreements were instead intended to be, and were, documented:[99]

> Mr Jeyaretnam: Dr Weiss, earlier you had said that the discussions and agreements during the face-to-face meetings were supposed to and were incorporated in the PCA. Now my question to you is: in that case, the negotiations were meant to result in documented

98 Certified Transcript (3 April 2018) at pp 176 (line 9) to 177 (line 9).

99 Certified Transcript (4 April 2018) at p 30 (line 15) to 31 (line 18).

agreements, written agreements, agree?

A: I -- yes, I responded it for many times now.

Q: You agree with what I've said?

A: I agree that they were documented.

Q: That the intention was to document and to arrive at --

A: You are saying it -- no, no, don't correct me. Not the intention, I'm saying they were documented.

Q: So you are saying then that during the negotiation meetings you were happy to leave some agreements undocumented?

A: I don't know what you refer to. For me, the rules[,] AA [*ie*, Articles] and the MA [*ie*, Memorandum] plus the company --program company documents, everything that establishes the mechanism by which the agreements will be managed and controlled.

Q: Well, maybe there's another way of asking this then, given your latest answers. Dr Weiss, is it then your evidence that actually everything that was agreed at the meetings went into writing, including the memorandum, the articles, the program rules, the PCA, but everything went into writing and there's nothing extra, no other agreement beyond what went into writing?

A: In respect to each of them I was involved in and, as I told you, I only dealt with the governance structures, *those documents are documenting everything.*

[emphasis added]

139 I recognise that at some points Dr Weis did give evidence consistent with the State's pleaded case that there was an oral agreement that was later reflected and implemented in most of the written documents.[100] But my examination of the evidence shows that these instances were few and far between. Dr Weis almost always referred to and fell back on the PCA instead as the reflecting agreement between the parties. The PCA, of course, was never entered into and does not bind the parties.

100 Certified Transcript (3 April 2018) at p 191 (line 25) to 192 (line 8); Certified Transcript (4 April 2018) at p 13 (lines 14–23).

140 I analyse Dr Weis' evidence concerning the PCA in greater detail below at [179] to [184]. For the moment, it suffices for me to note that Dr Weis' evidence largely does not support the State's case. He did not give clear evidence that the State and BHP entered into a partly oral agreement. Nor did Dr Weis identify when such an agreement was entered into, or the persons who made that agreement. Instead, the gist of his evidence is that the parties drew up a written contract which was intended to be legally binding and which set out the governance structure for PNGSDP, which was none other than the PCA.

141 To sum up my findings thus far, I have analysed the evidence of the key witnesses who can give direct evidence concerning the negotiations – and who can therefore give direct evidence of the existence of an oral agreement – and found that nothing they have said supports the State's case that the pleaded Agreement exists. None of the witnesses pointed to the existence of a partly oral agreement, much less to the existence of a partly oral agreement containing as its principal terms the Agreed Oversight Structure, the Direct Enforceability Term and the Consent Term.

When was the partly oral, partly written agreement entered into?

142 An additional difficulty with the State's case on the pleaded Agreement concerns the time when the Agreement was entered into. The State's pleaded case is that the Agreement was reached "in or around October 2001 prior to PNGSDP's incorporation".[101] PNGSDP argues that the State's failure to plead a specific date on which the parties allegedly entered into the oral agreement, or even a reasonably narrow range of dates, means that the State's case on the pleaded Agreement must fail for lack of certainty.[102]

101 Statement of Claim at paragraph 7.

102 Defendant's Closing Submissions at paragraphs 183–186.

143 PNGSDP relies on two cases.[103]

144 The first case is *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 ("*First Asia*"). In that case, the High Court held that an oral agreement must be pleaded with a degree of specificity, and that it is necessary that it be "reasonably certain" when the oral agreement was concluded. It is not sufficient simply to plead that an oral agreement was made in a particular calendar year (at [36]).

145 The second case is *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("*Likpin International*"). In that case, the High Court struck out an action on the basis that it was insufficient for the plaintiff to assert baldly that an oral contract was concluded over a "two-month" period. The High Court held that the plaintiff's inability to identify specifically when the oral agreement was concluded "point[ed] against the existence of the said agreement" (at [42]). Pertinently, the High Court noted that there could only be *one* date on which an oral agreement could be said to have been concluded, *ie*, the date on which there was "*consensus ad idem* – a meeting of minds to be bound by terms which are both certain and complete" (at [42]). The State, as PNGSDP points out, has failed to identify the specific date on which the Agreement was concluded.

146 The State contests PNGSDP's interpretation of the two cases. With regard to *First Asia*, the State argues that the High Court laid down only a requirement that a party relying on an oral agreement plead with "reasonable certainty" when the agreement was entered into.[104] Similarly, the State argues

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103 Defendant's Closing Submissions at paragraph 186.

104 Plaintiff's Reply Closing Submissions at paragraph 61.

that its pleadings in this case are quite different from the defective pleadings in *Likpin International*. The State says that it *has* identified a distinct period of time "in or around October 2001", which stands in contrast to the plaintiff's pleadings in *Likpin International* that the agreement was concluded over a two-month period, if made orally, or concluded on a specific date, if made in writing.

147 Further, the State argues that the courts do not take a "technical and pedantic" approach when ascertaining the existence of an oral agreement. Instead, the courts will "examine the whole of the documents in the case and decide from them whether the parties did reach an agreement", citing the Court of Appeal's decision in *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 at [16]. After all, the "function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed": *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40].

148 I am prepared to accept that it is not necessary for a plaintiff to plead the *exact* date on which an oral agreement is entered into. In this regard, I accept the State's argument that *First Asia* requires only that a party plead with reasonable certainty the date on which an oral agreement was entered into (at [36]). On any view, however, a pleading which merely asserts that an oral agreement was entered into in a particular calendar year or that it was somehow entered into over a two-month period fails the "reasonable certainty" test, as both *First Asia* and *Likpin International* make clear.

149 In this case, I find that the State has failed to specify with reasonable certainty when the Agreement was entered into. The State's pleadings identify

the 20 days in October 2001, before PNGSDP's incorporation on 20 October 2001, as the period in which the Agreement was entered into. This is not entirely satisfactory. I bear in mind that – as pointed out in *Likpin International* – an agreement comes into being as an event, not a process. That is so even though the negotiations leading up to the agreement are a process. There is of necessity a single point in time when the necessary *consensus ad idem* is reached. But even leaving aside the less than satisfactory state of the State's pleadings, I consider that the State's case is riddled with inconsistencies as to the time when the Agreement was entered into, all of which fatally undermine the State's case.

150 The State's pleadings, submissions, and evidence present three possibilities as to the date on which the Agreement was entered into. There are considerable difficulties with each of them.

151 The first possibility is that the Agreement was in fact entered into in September 2001, in particular 13 September 2001, which is when Mr Mercey said a "deal" was entered into. As I pointed out above in analysing Mr Mercey's evidence (at [122]), the State appears opportunistically to have adopted this "deal" as being the State's pleaded Agreement. The State relies on the NEC decision of 22 September 2001 as apparently endorsing an oral agreement and giving effect to it. But that must mean the Agreement pre-dates 22 September 2001. This possibility finds further support in Dr Weis' evidence that the three key terms were "discussed and agreed during the face-to-face negotiating meetings".[105] Dr Weis did not specify when those meetings took place. But Mr Mercey's evidence is that the "last meeting" between the teams took place on 13 September 2001.[106] Further, he was sure that no further meetings took place

105 Certified Transcript (4 April 2018) at p 13 (lines 14–23).

between the principals, *ie* the State and BHP, later in September or in October 2001.[107]

152 If the Agreement was in fact concluded on 13 September 2001, or at least, sometime in September 2001, as the State's Reply Closing Submissions suggest, then the State fails on its pleaded case. Mr Mercey's evidence concerning the "deal", and the reference made to the NEC's approvals being given to this "Agreement" for it to be implemented, are all for nought, because the agreement that was endorsed and given effect to is simply not the pleaded Agreement. The earlier part of September is well outside the State's pleaded case that the Agreement was concluded "in or around October 2001". I consider it to be stretching the meaning of "reasonable certainty" beyond breaking point to say that a party who pleads that an oral agreement was concluded in or around one month can claim to have proven its case by showing that an oral agreement was concluded in the first half of an earlier month. And I would also add that Dr Weis' evidence explicitly contradicts this possibility, because he gave evidence that no agreement had been reached by 13 September 2001.[108]

153 The second possibility is that the Agreement was in fact entered into in October 2001, but before 20 October 2001, as the State has pleaded. The difficulty with this argument is that none of the witnesses gave any evidence whatsoever to support such a case. The State has, for the larger part of its submissions, sought to stake its case not on the evidence of Dr Weis, its own witness, but on the evidence of Mr Mercey. Mr Mercey's evidence concerned the "deal", and that deal was entered into in September 2001. So the State's

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106 Mr Charles Mercey's Supplementary AEIC at paragraph 18.

107 Mr Charles Mercey's Supplementary AEIC at paragraph 19.

108 Certified Transcript (3 April 2018) at p 183 (lines 2–4).

pleaded case that the Agreement was entered into "in or around October 2001" fails for lack of evidence.

154 The third possibility is that the Agreement was entered into sometime after 13 September 2001 and before 18 October 2001. This possibility arises for consideration because the parties agreed after 13 September 2001 that BHP would transfer its entire shareholding in OTML to PNGSDP by 18 October 2001,[109] and not just 90% as envisioned on 13 September 2001. This possibility is supported by Dr Weis' evidence that the Agreement was reached "around September/October 2001",[110] but not, as will be recalled, on 13 September 2001 (see [152] above). Senior Counsel for the State referenced this timeframe in his oral submissions.[111]

155 This possibility fails for two reasons. The first is that this time frame is simply inconsistent with the pleadings. The second is simply that there is, again, insufficient evidence to support the contention. Mr Mercey's evidence concerning the "deal" would have to be disregarded, because on this argument the "deal" is *not* the Agreement. The reliance on the NEC's decision of 22 September 2001 endorsing the deal is therefore also of no evidential value. But no evidence has been proffered showing that the parties later met and agreed a fresh oral agreement incorporating the key change that BHP would transfer its entire shareholding in OTML to PNGSDP, instead of just 90%. Indeed, Mr Mercey's evidence was to the contrary, as I noted above at [151], and Dr Weis could not particularise the dates on which the meetings at which the oral agreements were purportedly entered into occurred.

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109 OTML's Letter (18 October 2001) titled "OK Tedi Reorganisation"; 2AB1323.

110 Certified Transcript (3 April 2018) at p 126 (lines 9–19).

111 Certified Transcript (14 August 2018) at p 49 (lines 12–18).

156 The vagueness in the State's pleadings, and the difficulties in aligning the pleadings with the evidence that has emerged, and indeed, with the State's own submissions, throw substantial doubt on the existence of the pleaded Agreement. I do not hold that on this ground alone the State's case fails, but it is an important factor in the overall analysis.

The circumstantial evidence

157 Thus far I have addressed how the evidence of the witnesses does not support the existence of the Agreement as pleaded. The State also submits that circumstantial evidence supports its case that the Agreement exists. I will examine the circumstantial evidence the State relies on in turn.

158 First, the State relies on the fact that the PNGSDP was incorporated. The State submits that this is a substantive legal act evidencing the Agreement, because the Agreement contemplated the incorporation of PNGSDP and this was duly carried out.[112] In my view, this does not advance the State's case. The fact that PNGSDP was incorporated is far too ambiguous an event to constitute circumstantial evidence that an Agreement containing the specific safeguards of the Agreed Oversight Structure, the Direct Enforceability Term and the Consent Term exists. At most, it is evidence that there might have been an oral agreement – in the loosest, non-legal sense of the word, that PNGSDP be incorporated.

159 In any event, one cannot isolate the act of incorporation alone and ignore the fact that PNGSDP was incorporated *on the terms of its constitutional documents*. Indeed, the State itself says that the Agreement is "evidenced by…

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112 Certified Transcript (14 August 2018) at p 39 (lines 1–22).

[t]he incorporation of PNGSDP on the terms of the [c]onstitution [d]ocuments".[113] Those documents must be taken as a whole.

160 The constitutional documents include specific and detailed procedures for amending those very documents themselves. Indeed, PNGSDP used those procedures to make the various changes which the State challenges in this action. So the incorporation of PNGSDP *on the terms of its constitutional documents* cannot be the evidence that the Agreement exists, or can only be very weak evidence that the Agreement exists, because the evidence itself incorporates procedures contrary to the Agreement. The State's rebuttal would be that it is the *use* of the procedures that is contrary to the Agreement, not the procedures themselves. But even so, it is difficult to see the constitutional documents as *circumstantial* evidence of the existence of the Agreement if the documents themselves set out procedures that contradict the very Agreement they are said to evidence. After all, drawn to its logical conclusion, an argument that an act is capable of being circumstantial evidence of the existence of an agreement, even if the act envisages and accommodates conduct which is inconsistent with the agreement, would mean that an agreement will almost always be found. Any inconsistencies would merely be explained away as "breaches" of the agreement.

161 Second, another piece of circumstantial evidence the State relies on is a letter of appointment of Mr Bainbridge to be a director of PNGSDP. That letter came from BHP and states that "under the Articles of Association, BHP Billiton as your appointer has the right to remove you from the position of a director at any time".[114] This is buttressed by the fact that Dr Garnaut also gave evidence

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113 Plaintiff's Closing Submissions at paragraph 212(a).

114 7AB5160.

that he believed his own appointment was subject to BHP's right of removal in a manner similar to that set out in Mr Bainbridge's letter of appointment, although his own letter of appointment was not in evidence.[115] The State says that this is circumstantial evidence supporting the existence of the Direct Enforceability Term, because even BHP thought that it had the right to enforce some of the provisions of the Articles against PNGSDP even though it was a non-member.

162 I accept that this is evidence suggesting that the parties intended for some parts of the constitutional documents to be directly enforceable by the State or BHP. The difficulty, however, is that this evidence alone is not evidence of the Agreed Oversight Structure or the Consent Term. So it hardly supports the existence of the wider Agreement. Further, it is only a very slender basis on which to say that parties *must* have agreed that the Agreed Oversight Structure would be directly enforceable by either the State or BHP, which is what the Direct Enforceability Term purports to provide.[116] This is because the relevant part of the Articles, Article 24, expressly provides that the appointors have a right to remove those directors they appoint. But it does not go any further to say that the State or BHP have rights to enforce other parts of the constitutional documents that reflect the Agreed Oversight Structure. The letter and Dr Garnaut's evidence are, at most, circumstantial evidence that the State and BHP agreed that they would have the right to appoint and remove directors and could directly enforce those rights against PNGSDP.

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115 Plaintiff's Closing Submissions at paragraph 324; Certified Transcript (14 August 2018) at pp 67 (line 19) to 68 (line 2).

116 Plaintiff's Closing Submissions at paragraph 303; Certified Transcript (14 August 2018) at pp 67 (line 19) to 68 (line 2).

163 Third, the State also relies on the evidence of Mr Anderson to the effect that as the chief executive officer of BHP at the relevant time, he would have intended that if rights had been given to BHP in the constitutional documents, it would be entitled directly to enforce those rights against PNGSDP.[117] That evidence, however, was not helpful to the State's case because it was elicited by a series of hypotheticals pitched to Mr Anderson, asking him to "assume" that if there were safeguards, he would "expect" that they could not be removed without the agreement of BHP.[118] Evidence as to Mr Anderson's approach to hypothetical situations is of course not circumstantial evidence that the Agreement *in this case* exists. And although the thrust of Mr Anderson's evidence may demonstrate an attractive logic that safeguards to protect a party should and must be enforceable by that party to be meaningful, it is important to be clear that logic is not itself evidence. Logic can be used to support and reinforce such positive evidence of the existence of the Agreement as may exist, but it is not itself positive evidence of the Agreement. And the function of this exercise is not to impute a logical intention to the parties but to ascertain objectively what their intention was.

164 In fact, to my mind, there are also other pieces of circumstantial evidence that run contrary to the State's case and which suggest that the Agreement does not exist. I shall refer first to three items of contemporaneous documentary evidence suggesting the contrary, and then highlight other features of the negotiations that suggest the parties would not have entered into any agreement which was partly oral.

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117 Plaintiff's Closing Submissions at paragraph 325; Certified Transcript (14 August 2018) at pp 67 (line 19) to 68 (line 2).

118 Plaintiff's Closing Submissions at paragraph 326.

165 The first item of documentary evidence is the Heads of Agreement of 29 June 2001.[119] That document reflects the position reached by the parties in their negotiations at that date. In particular, the preamble to the Heads of Agreement explicitly states the parties' intentions to document their agreements: "It is the parties' intention to seek to reach agreement on these issues, and subsequently document and implement BHP's withdrawal from OTML, as far as practicable in accordance with the timetable in Section (H) below". One of the items in that timetable in Section (H) is for the lawyers "ARH/Blakes to produce first draft of *definitive transaction documentation*" [emphasis added] by 21 July 2001. The Heads of Agreement is dated only four months before PNGSDP was incorporated on 20 October 2001. This places a significant hurdle in the State's path to show that the parties' intention changed in the short span of four months such that the parties reversed their original position and entered into a partly oral Agreement instead.

166 The second item of documentary evidence comprises letters from OTML to the Controller of Foreign Exchange at the Bank of Papua New Guinea. There is a first letter dated 18 October 2001, a mere two days before PNGSDP was incorporated.[120] That letter indicates that OTML was providing information to the Controller to aid his understanding of the transactions concerning the reorganisation of OTML. The Controller had to be informed because certain transactions required his approval under the Central Banking (Foreign Exchange and Gold) Regulation.

167 The letter makes clear that by this time, *ie*, 18 October 2001, the parties had decided that BHP would transfer all its shares in OTML to PNGSDP,

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119 2AB1234.

120 2AB1323.

instead of 90% of its shares which was the position as at 13 September 2001. The transfer of BHP's entire shareholding is, of course, one of the principal terms of the Agreement. This, together with the fact that the letter was sent a mere two days before PNGSDP was incorporated, suggests that the letter would give a complete picture of the transactions involving the reorganisation of OTML. In other words, if there truly had been a partly oral Agreement as the State alleges, then this would be mentioned in this letter. But there simply is no mention at all of any oral agreement whatsoever, much less a partly oral agreement in the form of the pleaded Agreement. I acknowledge that the letter states that although the Transaction Documents are well advanced, "they have not yet been finalised". But it is the *documents* which the letter states have yet to be finalised; the fact remains that nowhere is mention made of an oral agreement.

168 OTML sent a similar letter dated 9 November 2001 to the Controller. This letter followed up on the 18 October 2001 letter to provide the final form of the Transaction Documents.[121] There is again no mention of any partly oral Agreement. PNGSDP was already incorporated by that time. I agree with PNGSDP that it is telling that the Agreement, pleaded to be a *pre-incorporation* oral agreement by the State, is nowhere mentioned in this letter as well.

169 The State's obvious retort would be that the letters furnished to the Controller only those documents which were necessary for him to review. The partly oral contents of the Agreement did not require his review, and therefore no partly oral Agreement was mentioned. The 18 October 2001 letter, however, explicitly states that "[c]opies of all relevant Transaction Documents have been provided to you on the basis that this should aid your understanding of the

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121 2AB1328.

relevant transactions and their interrelationship, *notwithstanding that* certain of the Transaction Documents do not require authority under the *Central Banking (Foreign Exchange and Gold) Regulation*" [emphasis added].[122] And a similar sentence was inserted in the 9 November 2001 letter as well. So even at that time, OTML's intention was to give the Controller a complete picture of the transaction, not one which was confined to those aspects which fell within the Controller's remit. One would thus have expected a partly oral Agreement to have been mentioned.

170 The third item of documentary evidence is PNGSDP's Annual Report for 2002. This report does not record that PNGSDP is a party to any partly oral Agreement. The Report notes that "[t]he Company [*ie*, PNGSDP] is a party to a number of the agreements which were entered into to give effect to [BHP's] exit from [OTML]".[123] An Annex to the Report gives a "brief description of the documents to which the Company is a party". Nowhere is a partly oral agreement mentioned in this Annex.[124] As the Annual Report for 2003 makes clear, representatives of the State, including the Minister for Treasury and Finance, attended the Annual Meeting at which the 2002 Annual Report was presented to PNGSDP's shareholders.[125] No objection appears to have been made as to the failure to mention an oral agreement at this meeting.

171 These three items of written documentary evidence were made close to the time PNGSDP was incorporated. As the Court of Appeal in *Wong Hua Choon* has noted, the "first port of call for any court in determining the existence

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122 2AB1323.

123 4AB2875.

124 4AB2899.

125 5AB3234.

of an alleged contract and/or its terms would be the relevant *documentary* evidence" [emphasis in original] (at [41]). In particular, where the issue is "whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired" (at [41]). Those comments were made in a case where the Court of Appeal was asked to find the existence of a binding oral agreement. The Court then went on to examine the documentary record, including emails between the parties, and determined that such an agreement did exist. Its observations therefore also apply here, where the State asks this Court to find a binding partly oral Agreement. I have examined the contemporaneous documentary evidence, and consider that it detracts from the State's case that the parties intended to enter into a binding partly oral Agreement.

172 Quite apart from the documentary evidence, there is also other circumstantial evidence which points to it being highly unlikely that the parties would have entered into a partly oral agreement.

173 First, it cannot be gainsaid that the State and BHP are each in their own right very large and sophisticated organisations. One is a sovereign nation and the other is the largest mining company in the world. This transaction involved the parties dealing at arms' length with one another to create an entirely new entity in which a substantial part of Papua New Guinea's patrimony was to be vested. There were many parts to this larger transaction, as evidenced by the many written contracts which the State, BHP and other parties ultimately entered into, for example, the Master Agreement, the Security Trust Deed, the Security Deed, and so on. In my view, it is not unfair to recognise that this context would have motivated the parties to enter into written contracts

definitively and exhaustively setting out the precise terms actually agreed, instead of exposing their agreements to the vagaries of memory and ambiguity inherent in a partly oral agreement. This makes it correspondingly less likely the parties would leave any part of their agreement undocumented.

174 Second, there is also evidence that the State and BHP did not fully trust each other. Mr Mercey's evidence in his supplementary affidavit of evidence in chief was that "[t]he lack of trust between BHP and the State militated against either relying on an oral agreement".[126] This is quite understandable given their diametrically opposed reasons for wanting to create PNGSDP. One must recall that BHP wanted to exit the mining operations in Papua New Guinea without any future civil or criminal liability for environmental damage while the State was the very entity with the power to pursue BHP for that damage. This does not appear to be a case where parties enjoyed such mutual trust and confidence that they would have left complex and significant corporate governance arrangements to be agreed in a partly oral Agreement.

175 Third, the parties entered into at least 13 written contracts documenting different parts of the transaction. This is reflected in the Master Agreement dated 11 December 2001,[127] which makes reference to 13 Transaction Documents, each of which is an independent, written contract in its own right.[128] PNGSDP correctly points out that the agreements differed in important and material aspects. For example, different written contracts specify different governing laws.[129] This is evidence showing that parties had applied their minds

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126 Mr Charles Mercey's Supplementary AEIC at paragraph 27(c).

127 2AB1419.

128 2AB1433.

129 Defendant's Closing Submissions at paragraph 234.

to the details of their written contracts, right down to the specifics. This makes it even less likely that the parties would have been content to accept having significant corporate governance arrangements, such as the terms of the pleaded Agreement, agreed merely orally. An oral agreement simply runs contrary to the parties' behaviour and attitude towards contracting throughout the entire transaction.

176 Fourth, and following from the third point, it is surprising that *even assuming* a partly oral Agreement had been entered into, there appears not to have been a single document even evidencing the key terms of that agreement. On the most charitable view of the State's case, perhaps Dr Weis' evidence could be read as suggesting that the PCA is that document. However, I have found above that when Dr Weis referred to the PCA, he did not refer to it as merely the written expression of an oral agreement; instead he viewed the written PCA was the agreement *itself*. But a perusal of the PCA shows that it is in fact inconsistent with the terms of the pleaded Agreement, as I show below at [179]–[184], so even the PCA cannot be evidence of the Agreement.

177 The fact that the oral Agreement has nowhere been evidenced in writing, even as a matter of form and record, is another factor tending against a finding that the Agreement exists at all. Indeed, it is all the more surprising because the evidence of the State's only other witness, Mr Daniel Rolpagarea, the State Solicitor for the Independent State of Papua New Guinea, was that after the discussions, all the agreed terms were documented.[130] This was ultimately not the case.

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130 Certified Transcript (10 April 2018) at p 16 (lines 6–15).

178 In summary, the circumstantial evidence also does not support the existence of the Agreement, nor indeed of any of the key terms the State says exists, *ie*, the Agreed Oversight Structure, the Direct Enforceability Term, and the Consent Term. Indeed, the circumstantial evidence points directly against the Agreement existing.

Contradictions between the PCA and the Agreement

179 Dr Weis' evidence was that the unsigned and unexecuted PCA[131] dated December 2001 captured the Agreement between the parties, as the above analysis at [133]–[140] makes clear. Indeed, he confirmed as much in his evidence:[132]

> Q: Dr Weis, we'll come to the program company agreement in due course. But for the moment, could I just confirm with you what appeared to be your evidence earlier, that the program company agreement represents or reflects your full understanding of what the State's and BHP's rights were concerning the governance of PNGSDP?
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> A: Yes, it does.

180 Taking a generous view of his evidence, it might be said that he meant that the PCA merely documented some of the terms of a binding partly oral Agreement. But this cannot be right. PNGSDP correctly points out that the PCA either simply does not incorporate the key terms of the alleged Agreement or contradicts key terms of the alleged Agreement. I cite only three examples.

181 First, the PCA does not say anywhere that either BHP or the State has the right unilaterally to enforce anything in PNGSDP's constitutional

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131 Dr Iacob Weis' Supplementary AEIC at p 31.

132 Certified Transcript (3 April 2018) at p 137 (lines 12–17).

documents against PNGSDP. This undermines the State's case on the Direct Enforceability Term.

182 Second, the PCA also does not state anywhere that the rights of appointment of members and directors of PNGSDP are divided equally between BHP and the State, contrary to limb (b) of the Agreed Oversight Structure.

183 Third, the State claims as part of the Agreement the right unilaterally to remove the directors it has appointed if it so desires.[133] But the PCA at para 2(a) only provides that it is the members who upon receiving a direction "jointly from [BHP] and the State" are empowered to remove a named director of PNGSDP.[134]

184 The PCA, quite simply, cannot itself be the Agreement, nor can it be evidence in writing of the Agreement.

PNGSDP being a company limited by guarantee

185 I come now to what is arguably the strongest point in favour of the State's case. The State points out that, as the result of a considered decision, the State and BHP incorporated PNGSDP as a company limited by guarantee rather than as a company limited by shares.[135] The key feature which distinguishes a company limited by guarantee from the more typical company limited by shares is that the former does not have shareholders who are the *de facto* owners of the company's assets and who hold ultimate power in a company when acting collectively in general meeting. Thus, the shareholders of a company limited by

133 Plaintiff's Closing Submissions at paragraphs 238, 246 and 267.

134 Dr Iacob Weis' Supplementary AEIC at p 33.

135 Plaintiff's Closing Submissions at paragraph 319.

shares in general meeting hold the right to appoint and remove directors and thereby act as the ultimate check on the directors' conduct. PNGSDP has no shareholders who can hold the directors to account. Instead, Article 3 of PNGSDP's Articles provides that it is the *directors* who have the power to appoint and approve PNGDP's *members*.[136] As a result, PNGSDP simply has no corporate organ which can act as a check on its directors in order to ensure that they act in accordance with PNGSDP's constitutional documents and in the best interests of PNGSDP.[137]

186 The State says that the parties catered for the absence of shareholders who could hold PNGSDP's directors to account by entering into the Agreement. For example, Article 24 of the Articles provides that the appointors of the directors "may … at any time, by written notice to [PNGSDP], remove from office a Director appointed by that appointor and appoint a new Director as a replacement".[138] This, to the State, is the crucial check on the misconduct of directors. But unless PNGSDP is found to be a party to the Agreement, neither the State through its agencies nor BHP is able to enforce this critical right as appointors.[139] The State also submits that as a matter of logic, the State and BHP would not have gone to the trouble of setting out rights and safeguards in writing in the Articles if they could not enforce them directly: those safeguards would then be entirely meaningless.[140] Indeed, BHP thought it had a right to remove the directors which it had appointed. This is evidenced by Mr Bainbridge's letter of appointment and by Dr Garnaut's concurrence that this was also true of his

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136 1AB716.

137 Plaintiff's Closing Submissions at paragraph 320.

138 1AB718.

139 Plaintiff's Closing Submissions at paragraph 321.

140 Certified Transcript (14 August 2018) at p 67 (line 5) to 69 (line 2)

appointment, as set out above at [161]. The counterfactual scenario, *ie*, that the State and BHP truly have no rights to enforce this provision and the Agreed Oversight Structure as a whole, would be that PNGSDP's directors are its "absolute guardians".[141] They have the power, if they so desire, even to change the PNGSDP's objects set out in the Memorandum and to expend its assets for a purpose entirely outside the contemplation of the State and BHP. This cannot be right. Therefore, the Agreement must be found to exist.

187 I acknowledge that I find the State's narrative compelling and its logic attractive. But the essential problem, as I have elaborated above, is that this narrative stands alone and is unsupported by the evidence. There is no evidence that the parties entered into the pleaded Agreement or when they did so. And there is in fact evidence to the contrary from Dr Weis that the corporate governance arrangements were ultimately agreed separately in the unexecuted PCA, which terms do not coincide with and in fact are inconsistent with the Agreement (see [179]–[184] above).

188 Further, it also does not appear to be the case that PNGSDP's constitutional documents have absolutely *no* safeguards against directors' misconduct. PNGSDP suggests that the directors were given this degree of liberty because it was hoped that PNGSDP would someday be self-perpetuating.[142] As Mr Anderson put it in his evidence, there was the hope that PNGSDP would be "like the Ford Foundation, which would have an infinite life and be totally independent of the people that set it up 100 years ago".[143] I agree with the State that this particular narrative, having been raised only at the last

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141 Certified Transcript (14 August 2018) at p 68 (lines 9–14).

142 Defendant's Closing Submissions at paragraph 27.

143 Certified Transcript (18 April 2018) at p 19 (lines 5–10)

minute during the trial itself, seems somewhat artificial. I have therefore not placed any weight on it.

189 That said, there is objective evidence in the form of the constitutional documents themselves which do contain safeguards that ensure PNGSDP's funds are protected and directed to their intended use. First, PNGSDP's obligation to comply with the Program Rules is a contractual one enforceable by the State and BHP under Clause 3.2 of the Master Agreement. PNGSDP, the State, and BHP are all parties to this agreement. That provision reads:[144]

> **3.2 Agreement to comply with rules of PNG Sustainable Development Program**
>
> In consideration of the transfer of the Shares under clause 3.1, the Program Company agrees and undertakes for the benefit of BHP Minerals, BHP Billiton, the State and the Company that it will comply with the Rules of the PNG Sustainable Development Program which are set out in the schedule to its Articles of Association (as those Rules may be amended from time to time). The obligation imposed by this clause on the Program Company survives Completion.

190 Similarly, PNGSDP was under an obligation not to alter its Articles so as to amend the Program Rules without the consent of either BHP or the State, pursuant to Clause 11 of the Security Trust Deed. The State, BHP, and PNGSDP are among the parties to this agreement.[145] Clause 11 reads:

> **11. PROGRAM RULES**
>
> **11.1 No amendment without approval**
>
> The Program Company must not alter its Articles of Association so as to amend the Program Rules in any respect without the prior approval in writing of BHP Billiton and the State.
>
> **11.2 Consent of OTML**

144 2AB1421.

145 4AB2490.

> BHP Billiton and the State must not consent to an amendment to clauses 7, 8, 9, 10, 11 or 12 of the Program Rules (or any amendment to the definitions in the Program Rules, in so far as it affects any of those clauses) without the consent of OTML such consent not to be unreasonably withheld.

191 Clause 11 of the Security Trust Deed itself mirrors the language used in Clause 8 of PNGSDP's Memorandum:[146]

> **8.** The Articles of Association of the Company shall not be altered so as to amend the Program Rules in any respect without the prior approval in writing of:
>
> (i) BHP Billiton Limited, a company incorporated in Australia, or any successor corporation resulting from a merger, amalgamation or corporate reorganisation of BHP Billiton Limited, given in the form of a document signed on its behalf by a director of that Company; and
>
> (ii) the Independent State of Papua New Guinea, given in the form of a document signed by a Minister of the State.

192 The Program Rules provide that the program which PNGSDP runs must be administered in accordance with PNGSDP's objects, and also expressly provide for how funds should be spent. In this regard, Rules 2, 7, 8, 9, 10 and 16 are particularly relevant. The result of reading the Program Rules together with Clause 3.2 of the Master Agreement and Clause 11 of the Security Trust Deed is that these core rights are entrenched and protected against alteration or amendment at the mere whim of the directors.

193 It is true that even with all these safeguards, the directors and members of PNGSDP still enjoy a fairly wide freedom to act. As the State points out, the objects clause, Clause 3 of PNGSDP's Memorandum, is not entrenched. PNGSDP concedes this is true.[147] This presents the possibility that the members,

146 1AB713.

147 Certified Transcript (15 August 2018) at p 64 (lines 13–16)

who are appointed by the directors, are at liberty to amend PNGSDP's objects. That said, the Program Rules do circumscribe the purposes to which funds may be spent. In particular, it bears noting that Rule 10.4 is a catch-all clause that provides that monies in PNGSDP's Long Term Fund must be:[148]

> … applied to Sustainable Development Purposes for the benefit of the people of the Western Province and those of the rest of PNG … with the objective of minimising the dislocation in the Western Province of Papua New Guinea caused by Mine Closure and assisting with other aid agencies and developmental groups in the maintenance of expenditures on services and support for Sustainable Development Purposes within the Western Province of Papua New Guinea at the level funded by OTML and its associated entities before Mine Closure.

194 I appreciate that "Sustainable Development Purposes" is elsewhere defined to mean "projects and other applications, which, in the discretion of the Company (acting in accordance with the Objects), are for long term social, economic and/or environmental benefits of the people of Papua New Guinea".[149] So a change in the objects clause, Clause 3 of the Memorandum, would have run-on effects in the Program Rules. But the descriptions given in Rule 10.4, and the analogy drawn to spending by OTML before Mine Closure, in my view do narrow somewhat the discretion afforded to the directors in applying the funds of PNGSDP. It is a wide discretion, but not an absolute one.

195 The short point, however, is that the evidence before me clearly shows that the parties applied their minds to the question of entrenching the rights of the parties which they considered to be core rights, and either deliberately chose not to entrench this provision or neglected to do so, important though it may be. The possibility that the parties intended to give the directors the liberty to safeguard and protect PNGSDP's funds and assets as they saw fit in the future,

148 1AB732.

149 1AB742.

including by amending the objects clause, is not one that I can reject out of hand, and certainly not without evidence to the contrary.

196 The State relies on the fact that Dr Weis and Mr Mercey have both confirmed that the arrangements reflected in the Memorandum and Articles at the time PNGSDP was incorporated was what BHP and the State had, after heavily contested negotiations, ultimately agreed to.[150] I do not think that that is in any doubt. But simply because those were the arrangements that were to apply at the beginning of PNGSDP's life does not mean that the parties intended for them to be immutable. The mechanism for making them immutable was available to the parties, but the parties did not use it.

197 The State is essentially asking this court to recognise that leaving the directors as the "absolute guardians" of PNGSDP is a risk far greater than the parties could have contemplated bearing, and on that basis to find that the Agreement exists. But, as I have just pointed out, the directors are *not* the *absolute* guardians of PNGSDP. The State and BHP have both entrenched certain rights in the Program Rules. That means that the State's case has to be narrowed to a submission that the parties cannot have intended the directors to have *as wide a discretion* as they appear to have now. This, however, is a much less compelling argument, and I cannot find that the Agreement exists on nothing more than this basis. As I have already stated, logic alone cannot be the basis for finding a binding contractual agreement. There must be evidence that the Agreement exists. There is none.

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150 Plaintiff's Closing Submissions at paragraphs 240–242.

Conclusion on direct and circumstantial evidence

198 To sum up my findings thus far, the State has failed to discharge its burden of proving the existence of the alleged partly oral component of the Agreement, which contains the key terms: the Agreed Oversight Structure, the Direct Enforceability Term and the Consent Term. There simply is insufficient evidence of any kind to show that such an Agreement exists. And there is substantial evidence that it does not exist. I therefore hold that the Agreement does not exist.

199 For completeness, I now touch briefly on some of the other arguments raised by the parties.

Breach of the parol evidence rule

200 PNGSDP alleges that the pleaded Agreement breaches the parol evidence rule. I understand the submission to be that because the Agreement was reduced into writing, being reflected in the constitutional documents, evidence of an oral agreement which contradicts or is inconsistent with its terms of the Agreement cannot be admitted. This point was not strongly pursued, and only very brief arguments were made in submissions. In light of my findings on the evidence above, it becomes unnecessary to consider this point and I need say no more of it.

Presumption of documentation

201 PNGSDP argues that there is a presumption that in a transaction which is as complex and contentious as this one, and which is intended to set out arrangements which are to last long into the future, and which involve large

sophisticated entitles dealing at arm's length with the benefit of sophisticated legal advice, all relevant agreements would have been documented.

202 I do not find it necessary to make a definitive finding whether such a presumption exists at the level of principle. In so far as PNGSDP's point has been supported by examples of the complexity and other unique features of *this* particular transaction – and there are indeed several examples of this – I have canvassed those examples above in my discussion on the circumstantial evidence in this case at [173]–[177].

Oral agreement superseded by written documents

203 One argument PNGSDP makes is that even if a partly oral Agreement had been entered into before the written contracts were finalised and executed, the partly oral aspects of that prior Agreement were superseded, exhausted and extinguished by the written contracts. This argument is founded on the English Court of Appeal decision in *Papas Olio JSC v Fourrages SA* [2009] EWCA Civ 1401 ("*Papas*"). In particular, PNGSDP relies on a statement made by the Court of Appeal at [28] that "the written document fulfils a dual function; it both confirms evidentially the making of the oral agreement but also supersedes the oral agreement in that it provides a document to which the parties thereafter look as the expression of their bargain".

204 The decision, however, does not truly stand for that principle. The very limited question before the English Court of Appeal in that case was whether an arbitral award had been sent to the correct party at the right address. The party against whom the arbitral award had been made argued that it did not carry on business at that address. But that party's address had been taken from certain documents confirming the party's participation in a contract. The court held that

it was unnecessary that the address be drawn from the contract. It was enough that the sending party reasonably considered the address to be the receiving party's address (at [25]–[26]).

205 The Court went on only *obiter* to make the observations that PNGSDP relies on. And even then it was more equivocal in its observations. It observed that "[w]here the oral contract is followed by a written confirmation setting out fuller terms to which the other party is judged by the fact finder to have assented, it is of *no practical importance* whether the situation is analysed as the parties as having entered into a partly oral and partly written contract or as having entered into a written contract" [emphasis added]. The Court thought it was "[p]robably the better analysis" that the written document be viewed as superseding the oral contract, but it appears that that is only true for evidential purposes (at [28]). Ultimately, whether the document was viewed as a contractual document, or a mere written expression of an oral agreement, the point was that the document identified the address (at [29]). It is clear the Court did not decide the point of principle as to whether oral agreements are *always* superseded by written documents. The question and observations of the Court in *Papas* are therefore too far removed from our facts to be of assistance here.

206 In any event, one needs to look no further than *Wong Hua Choon* itself to find Singapore case law that a binding oral agreement can be entered into that is subsequently documented. The Court of Appeal held in *Wong Hua Choon* that the written Supplemental Agreement there constituted both a mere formality *and* a document that confirmed a binding oral contract had *already* been entered into (at [59]). PNGSDP's argument therefore fails.

Absence of authority to enter into oral agreement

207 An additional point in support of my finding that the Agreement was never entered into is the fact that the representatives of both the State and BHP lacked the authority to enter into an oral agreement.

208 The evidence before me was that there was a set procedure under Papua New Guinean law for the State to enter into contracts, particularly contracts exceeding a certain value. As Mr Rolpagarea said in his evidence, the NEC had to endorse all agreements the State entered into.[151] This was the procedure applied in this case. Dr Weis' evidence was that the PNGSDP governance arrangements had to be brought to the attention of the NEC via a written submission to the council.[152] A set of six NEC decisions concerning BHP's exit from OTML was belatedly tendered in evidence during trial itself.

209 Of particular relevance is NEC Decision No 223 of 2001, dated 5 December 2001. In that decision, the Council states that it had on 4 December 2001 "endorsed the transaction documents encompassing *all the agreements* that have been reached between the shareholders of OTML on the terms and conditions of BHP Billiton's exit from OTML" [emphasis added].[153] This decision was taken in response to a submission paper, Statutory Business Paper No 112 of 2001. The submission paper states, on its very first page, that it seeks the NEC's "endorsement of the transaction documents encompassing *all the agreements* that have been reached between the shareholders of OTML on the terms and conditions of BHP Billiton's exit from OTML".[154]

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151 Certified Transcript (9 April 2018) at p 42 (line 24) to 43 (line 4).

152 Certified Transcript (9 April 2018) at p 128 (lines 2–14).

153 Plaintiff's 2nd Supplementary Bundle of Documents, at p 24 (see paragraph 1).

154 Plaintiff's 2nd Supplementary Bundle of Documents, at p 198.

210 The submission paper and the decision were made barely a month after PNGSDP had been incorporated, and one would have expected an oral agreement, especially one touching on the corporate governance arrangements of PNGSDP, to have been mentioned if it existed. After all, the NEC was asked to give its endorsement to *all* the agreements reached between the shareholders of OTML, which included BHP and the State, concerning the transaction. No mention was made of any partly oral agreement.

211 Further, Mr Rolpagarea's evidence was also that none of the six NEC decisions ever mentioned an oral agreement, or even a partly oral agreement.[155]

212 The contemporaneous documentary evidence therefore suggests that the State never entered into a binding partly oral agreement. But PNGSDP takes its point one step further by pointing out that in each of its decisions, the NEC gave its "approval" to advise the Head of State to execute the various documents recording the agreements entered into by the shareholders of OTML. This suggests that the State's representatives at the negotiations would have had no authority to commit the State to any binding oral agreement, as it would have to be the Head of State who did so. I accept this argument.

213 Turning to BHP, it is also apparent to me that BHP's representatives in the negotiations lacked authority to commit BHP to a binding oral agreement. BHP's representatives were given powers to execute agreements under a Power of Attorney dated 5 September 2001.[156] But the scope of authority granted under the Power of Attorney is limited to executing only *documents*, and even then, only those documents of the nature specified in Schedules 1 or 2 to the Power

155 Certified Transcript (12 April 2018) at p 37 (lines 3–25).

156 2AB1362.

of Attorney.[157] This was not a case where the State's representatives could have been misled as to the scope of BHP's representatives' authority to enter into agreements. Indeed, Dr Weis confirmed that BHP's representatives, Mr Gary Evans, Mr Graham Evans and Mr Bill Smith, constantly referred back to BHP headquarters to receive authority to take further steps in the negotiations.[158] So the BHP representatives had no actual authority to enter into a binding oral agreement, nor could there have been even apparent authority to do so.

214 In short, none of the representatives at the negotiations had the authority to commit their respective principals to a binding oral agreement.

Ratification of the pre-incorporation agreement

215 Thus far I have found that the evidence simply does not support the existence of the State's pleaded partly oral, partly written Agreement, and that the representatives of the parties in the negotiations whom the State alleges entered into the Agreement did not have the authority to do so in any event. But even if I am wrong on these points, and *assuming* the Agreement exists, it bears recalling that it is also the State's pleaded case that the Agreement is a pre-incorporation contract which PNGSDP ratified upon incorporation.[159] It should also be recalled that it is not simply the State and BHP who are parties to the Agreement, although that has taken up the better part of the discussion thus far. The State's pleaded case is that PNGSDP itself is a party to the Agreement. Presumably this is to buttress the State's case that the State is entitled to enforce the Agreement against PNGSDP. The question therefore is whether PNGSDP ratified the Agreement, assuming it to exist, once PNGSDP was incorporated.

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157 2AB1364.

158 Certified Transcript (3 April 2018) at p 190 (lines 8–18).

159 Statement of Claim at paragraph 9A.

216 Section 41(1) of the Companies Act (Cap 50, 2006 Rev Ed) accommodates pre-incorporation contracts and provides that they will bind a company upon its incorporation only if ratified:

> Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.

217 There are therefore two steps for a pre-incorporation contract to bind a company, as the learned author of *Walter Woon on Company Law* (Tan Cheng Han, SC, gen ed) (Sweet & Maxwell, 3rd Ed, 2009) states at paras 3.57–3.60. First, there must be a contract which the company purportedly entered into, or which any person purported to enter into on behalf of the company, before the company was incorporated. Second, the company must ratify the contract upon incorporation. Ratification may either be express or implied. Ratification is express where the company passes a resolution expressly adopting the contract. And ratification is implied if the company "does some act indicating unequivocally that it considers the contract to be binding" upon the company.

218 The State pleads that PNGSDP impliedly ratified the Agreement by carrying out a number of unequivocal acts after it was incorporated.[160] These include: (a) PNGSDP entering into the agreements listed at [21(a)–[21(e)] above;[161] (b) PNGSDP seeking BHP's approval for a change in one of the appointing authorities for "B" directors; (c) PNGSDP's compliance until October 2012 with Article 24 of the Articles in appointing directors; (d) PNGSDP seeking the approval of the State and BHP to changes to the

160 Plaintiff's Closing Submissions at paragraph 360.

161 Statement of Claim at paragraph 9A(a).

Program Rules "in accordance with clause 8 of the Memorandum" before making the changes; (e) the Annual Reports of PNGSDP for the years 2007 to 2012 stating that "changes to the Program Rules *and structure* can only be made with the consent of [the State and BHP]"; and (f) the depiction of the Agreed Oversight Structure in the various organisational charts in PNGSDP's Annual Reports for the years 2002 to 2011.

219 I do not accept that PNGSDP has impliedly ratified the Agreement as a pre-incorporation contract. First, it is unclear who were the person or persons who purported to enter into the Agreement on behalf of PNGSDP prior to its incorporation. The State has in its reply written submissions and oral submissions suggested that Dr Weis and Mr Bill Smith were those persons, for two reasons. First, they became directors of PNGSDP shortly after it was incorporated. Second, they participated in the negotiations in which the partly oral Agreement was entered into and therefore had knowledge of its terms.[162] But it suffices to note that no witness for the State gave any evidence that either of these persons entered into the Agreement *on behalf of PNGSDP*, even Dr Weis.

220 Second, as for ratification itself, the State has identified various acts carried out by PNGSDP which are unequivocal in their effect and which are capable of amounting to ratification. But I am simply not satisfied that these acts show unequivocally that PNGSDP considered *the Agreement* to be binding upon it. In other words, PNGSDP's conduct in carrying out these acts is not unequivocally referable to the Agreement, which is what must be shown: *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] SGHC 30 at [72]. I explain.

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162 Certified Transcript (14 August 2018) at p 96 (line 20) to 97 (line 19).

221 First, the fact that PNGSDP entered into the five written contracts identified above at [21(a)]–[21(e)] does not indicate unequivocally that it considers the Agreement to be binding upon PNGSDP. PNGSDP's entering into these written contracts after incorporation was a condition upon which PNGSDP was incorporated. But that means that PNGSDP's entering into these written contracts after incorporation points unequivocally to nothing more than an agreement that PNGSDP be incorporated. It does not point unequivocally to the critical aspects of the Agreement upon which the State's case is founded, such as the Agreed Oversight Structure, the Direct Enforceability Term and the Consent Term.

222 Second, the State relies on the fact that PNGSDP sought BHP's approval before PNGSDP substituted the Auditor General of Papua New Guinea for the Minister of the Treasury as an appointing authority for one "B" director as evidence that PNGSDP ratified BHP and the State sharing joint and equal oversight over PNGSDP. Dr Garnaut's evidence in cross-examination was cited as the basis for the State's submission that BHP's approval was sought for this change in the appointing authority. Dr Garnaut was chairman of the board of directors of PNGSDP at the material time.

223 Dr Garnaut, however, did not say that BHP gave its *approval* for the change. His evidence instead was that PNGSDP sought BHP's views on the change in appointing authority and that BHP expressly indicated that the change was not its "responsibility". Moreover, Dr Garnaut expressly rejected the notion that PNGSDP sought BHP's approval. His evidence instead was that PNGSDP was merely keeping BHP informed about the change. The relevant parts of the transcript read:[163]

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163 Certified Transcript (24 April 2018) at pp 92 (line 18) to 95 (line 12).

> Q: Right. Now, you make no mention in this affidavit about seeking the views of BHP or what their views were. Wasn't it correct that BHP's views were sought?
>
> A: Yes, in the course of general briefings to the -- to BHP, I mentioned this, and they indicated that it was not an issue for them.
>
> Q: So you did convey this to BHP, of the proposed change, and BHP indicated that it was not an issue for them.
>
> A: They indicated it was not an issue for them; it was not a responsibility for them.
>
> Q: It was not a responsibility for them. They did not raise any objection to the change, is that right?
>
> A: That's correct.
>
> …
>
> Q: I further suggest to you, Professor Garnaut, that this was consistent with the arrangement as reflected in, for instance, the 2007 annual report, that there be no changes to the program rules or structure -- sorry, program rules and structure without the consent of the State and BHP.
>
> A: No, I don't think it is, because we were not seeking the consent of BHP. I adopted a practice of keeping the State and BHP informed of PNGSDP activities, and this was a change, a development, that I thought I would keep them informed about.
>
> Q: I suggest to you that you were doing more than simply keeping them informed; you were seeking their views, and it's only because they were agreeable to it that the change got made. You can agree or disagree.
>
> A: I disagree.

224 Third, the fact that PNGSDP has appointed directors in compliance with Article 24 of the Articles says nothing more that is unequivocal than that PNGSDP complied with Article 24. It so happens that Article 24 is one of the provisions in the Articles which the State says is a core part of the alleged Agreed Oversight Structure.[164] But given that the acts of appointment can be

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164 Statement of Claim at paragraph 14(c).

explained on the basis that PNGSDP's directors and members were complying with Article 24, this also means that the appointments do not point unequivocally towards the existence of the Agreement. They can simply be justified on another basis, *ie*, compliance with Article 24.

225 Fourth, the fact that PNGSDP sought the approval of the State and BHP for amendments to the Program Rules is unsurprising. Clause 8 of the Memorandum expressly requires this. The fact that it was done is equally explicable on the basis of compliance with Clause 8 by the directors of PNGSDP. This too does not amount *unequivocally* to PNGSDP indicating that it intended to be bound by the Agreement.

226 Fifth, the State argues that PNGSDP's acknowledgment in its Annual Reports that "changes to the Program Rules *and structure*" require the consent of the State and BHP as amounting to ratification. This submission, in my view, places more weight on the words "and structure" than their meaning can reasonably bear. The State finds these words in a passage in PNGSDP's Annual Report of 2007 which was replicated in essentially the same terms in subsequent Annual Reports up to 2012:[165]

> **The Board, its key duties and responsibilities**
>
> The Board must independently oversee the operations and projects of PNGSDP in accordance with the Articles of Association and the Program Rules.
>
> The Board is not subject to the direction or control of the Independent State of Papua New Guinea or BHP Billiton. However, in accordance with the Memorandum and Articles of Association, changes to the Program Rules *and structure* can only be made with the consent of those parties.
>
> [emphasis added in italics]

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165 6AB3869.

227 The State says that, by adding the words "and structure", PNGSDP acknowledged that it required the State's and PNGSDP's consent, not only for changes to the Program Rules, but also for changes to PNGSDP's governance structure.[166] In other words, these words evidence the Agreed Oversight Structure and PNGSDP's ratification of the Agreed Oversight Structure. Similarly, the fact that PNGSDP acknowledged that the Agreed Oversight Structure cannot be changed without consent of the State or BHP is evidence the Consent Term exists and ratification of the Consent Term.

228 PNGSDP, on the other hand, says that the "structure" referred to here is the structure of reporting lines put in place by the Program Rules. Thus, for example, reporting lines up to the chief executive officer of PNGSDP was part of the structure that could not be changed, because it had been established pursuant to the Program Rules.[167]

229 I do not think that much weight can be placed on words "and structure" to support the existence of the Agreed Oversight Structure or the Consent Term or their ratification. The phrase is simply too short and too vague. It certainly does not point unequivocally to PNGSDP indicating that it considers the Agreement to be binding. I would also add that if the words "and structure" bear the meaning the State alleges they do, then it is surprising that they appear for the first time somewhat belatedly, six years after the Agreement was entered into and six years after PNGSDP was incorporated.

230 Sixth, the State relies on various organisational charts which appear in PNGSDP's Annual Reports as supporting the existence of the Agreed Oversight

166 Plaintiff's Closing Submissions at paragraph 329.

167 Defendant's Closing Submissions at paragraphs 325–326.

Structure and as ratification of it. The State argues that the depiction of the governance structure of PNGSDP in these charts from 2002 to 2011 "deliberately reflected BHP and the State at the top of the governance structure as the entities with agreed oversight over PNGDP". In my view, however, it is very difficult to infer from the organisational charts that the parties necessarily intended that there be an Agreed Oversight Structure, the Direct Enforceability Term, and the Consent Term. As Dr Garnaut put it in his evidence, "[one] does not learn very much from this chart what the actual relationships are between the various elements from the existence of a line".[168] The organisational chat were only "an attempt to convey pictorially, in a simple form, a complex reality".[169] I agree with this description. Let me elaborate.

231 One might say that BHP and the State would not be depicted at all in the organisational charts if they had no place in PNGSDP's oversight structure. I can certainly accept that. But PNGSDP does not deny that the State and BHP have *some* rights of oversight; it simply denies the existence of the rights which the State claims exist. So if the lines leading up from PNGSDP to BHP and the State are interpreted to mean that the State and BHP have rights to information, that can be explained on the basis that PNGSDP does accept that pursuant to Rule 20 of the Program Rules, the State and BHP have a right to annual audited accounts and a report, as I explain below at [265]. But they do not necessarily mean that PNGSDP also has to give "information" and that Clause 9 of the Memorandum and Article 52 of the Articles are directly enforceable by the State or BHP, which PNGSDP denies. And similarly, even if they are interpreted as meaning that the State and BHP are the appointors of PNGSDP's directors, which is consistent with Article 24 of the Articles, it is not evident from the

168 Certified Transcript (24 April 2018) at p 45 (lines 1–4).

169 Certified Transcript (24 April 2018) at p 45 (lines 10–14)

lines whether the right of appointment under Article 24 was to be directly enforceable by either the State or BHP.

232 Further, I would add that the organisational charts engendered great confusion amongst the witnesses on both sides. No one could explain satisfactorily why the lines sometimes took different forms, for example, bold or dotted. And none of the State's witnesses, in particular, could convincingly explain how the lines reveal the existence of the Agreed Oversight Structure. In my view, the organisational charts do not support the existence of the Agreement or ratification of the Agreement.

233 In addition, if the parties had truly entered into the Agreement as a pre-incorporation contract which was then ratified post-incorporation, as alleged by the State, one would expect the Agreement to be mentioned in the list of agreements which PNGSDP indicated it was a party to in its first Annual Report, in 2002.[170] The Agreement was obviously an important one because it placed restrictions on the directors' and members' rights under the Memorandum and Articles. But there is no such mention.

234 The State places some reliance on the Federal Court of Australia's decision in *Rafferty v Madgwicks* [2012] 203 FCR 1 ("*Rafferty*"). The facts in that case concerned a commercial joint venture arrangement and are too dissimilar for precise factual analogies to be drawn. But the principles distilled from the case apply. Two holdings are important. First, the Court held that because the precise factual backdrop suggested that the promoters of the company knew about the purposes to which the joint venture were to be applied and became directors of the joint venture company upon its incorporation, the

170 4AB2899.

joint venture company would have known the terms of the pre-incorporation agreement such that it could be bound by it (at [142]). Second, the Court held that the joint venture company had impliedly ratified the pre-incorporation agreement because it had entered into further agreements as contemplated by the pre-incorporation agreement (at [143]).

235 *Rafferty* does not assist the State. As I have noted above, the evidence was scant as to whether any representatives from BHP, or even the State, knew the terms of the pre-incorporation Agreement. The Court in *Rafferty* held that the joint venture company would naturally have been bound by the terms of the pre-incorporation agreement because the rights and obligations set out in that agreement "were central to the creation of the joint venture" (at [142]), and because the "guiding mind[s]" of the joint venture company were in fact the promoters (at [143]). It is not clear that the same can be said of the terms asserted by the State here, or of the representatives participating in the negotiation.

236 In any event, as I have shown above, it is also not the case here that the actions carried out by PNGSDP were *unequivocally* referable to the Agreement. In this regard, it must be borne in mind that the Agreement in the present case, unlike the agreement in *Rafferty*, is a partly oral one. The temptation is naturally very high for a party in the position of the State to construct an Agreement *ex post facto* out of actions which were carried out for purposes quite separate from the Agreement. In my view, cogent evidence is necessary to show that PNGSDP's actions *unequivocally* point to the existence of the Agreement as a pre-incorporation contract which PNGSDP ratified and thereby made binding upon it. That standard has not been met here.

237 For completeness, I note that the State has also in its submissions suggested that implied ratification is evidenced by the fact that the State and BHP were given a right to inspect PNGSDP's accounts.[171] This was not pleaded, and therefore I do not consider it.

238 In conclusion, I find that the State has failed to prove that the Agreement, even if it exists, was entered into on behalf of PNGSDP before it was incorporated, and was ratified by PNGSDP after it was incorporated. This is another reason why the State's case on the Agreement fails.

The existence of individual terms

239 I have thus far analysed whether the Agreement exists as an indivisible whole. I have held that the State has adduced no direct or circumstantial evidence that the Agreement exists. And I have also identified two separate and independent bases on which I would have held, if it were necessary, that the Agreement does not exist, *ie*, the representatives of BHP and the State who allegedly entered into the partly oral Agreement did not have the authority to do so to the extent that it was oral; and PNGSDP did not ultimately ratify the Agreement as a pre-incorporation contract.

240 The parties have also mounted lengthy arguments on the existence of each of the three limbs of the Agreed Oversight Structure, and on the Direct Enforceability Term and Consent Term, as separate contractual obligations. PNGSDP submits that the State has run its case in its written submissions on the basis that the Agreed Oversight Structure operates "seamlessly".[172] In other words, PNGSDP submits that the State's case on the Agreed Oversight

171 Plaintiff's Closing Submissions at paragraph 368.

172 Plaintiff's Closing Submissions at paragraph 238.

Structure is indivisible, such that if the State fails to prove any limb of the Structure the entire Structure must be found not to exist.[173] I note, however, that the State did not plead its case this way. I therefore adopt a charitable reading of the State's case and examine each limb anyway.

241 Before examining each limb of the Agreed Oversight Structure, I should make clear that the State's pleaded case is *not* that this structure is to be implied into PNGSDP's constitutional documents. Instead, the State's case is that it is depicted in PNGSDP's Annual Reports in the form of the organisational chart above at [98] and is also "borne out" in Clauses 8 and 9 of the Memorandum, Articles 24, 37, 38 and 52 of the Articles, and Rules 4.2 and 20 of the Program Rules.

The first limb of the Agreed Oversight Structure

242 The first limb of the Agreed Oversight Structure which the State pleads is that the "members, directors and staff of PNGSDP are to report, and are accountable, to BHP and the State". It is not entirely clear from the pleadings what precisely the State means by "accountability". But the State later clarified that "accountability" simply means the right of the State or BHP unilaterally to appoint and remove directors.[174] Further, the State argues that because PNGSDP's members and senior executives are appointed at the full discretion of PNGSDP's directors, the members and senior executives – by being accountable to the directors – also become accountable to BHP and the State.[175] The State has also clarified that accountability does *not* mean that the State or BHP has the power to direct PNGSDP's directors to act in a certain manner.[176]

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173 Defendant's Closing Submissions at paragraph 248.

174 Plaintiff's Closing Submissions at paragraphs 267 and 274.

175 Plaintiff's Closing Submissions at paragraph 268.

Under this model of accountability, if the State or BHP want to make any amendments to the Articles, they have to ask the directors to do so, and even then it would be up to the directors whether or not they did do so.[177]

243 Now that accountability has been cut down to the right to appoint, replace and remove directors, I consider that whether this limb of the Agreed Oversight Structure exists depends on the second limb of the Agreed Oversight Structure, which deals expressly with that right. I therefore examine that limb now.

The second limb of the Agreed Oversight Structure

244 The second limb of the Agreed Oversight Structure pleaded by the State concerns the equal right of the State and BHP to appoint and remove or replace three directors each to PNGSDP's board. The State submits that this limb is reflected in the Articles. Articles 24 and 25 together set out the right of BHP and the State each to appoint three directors to PNGSDP's board.[178] Articles 37 and 38 deal with the quorum requirements and provide that there must at least be one "A" director and "B" director for a meeting to be quorate.[179] This structure was carefully negotiated, with the intention that neither side would be able to exclude or override the other from the decision-making process.[180]

245 PNGSDP responds that the articles relied on by the State do not on their face support the State's contention. Article 24 expressly provides that "B"

176 Plaintiff's Opening Statement at paragraph 29; Plaintiff's Closing Submissions at paragraph 269.

177 Plaintiff's Closing Submissions at paragraph 271.

178 Plaintiff's Closing Submissions at paragraph 246(a).

179 Plaintiff's Closing Submissions at paragraph 246(b).

180 Plaintiff's Closing Submissions at paragraph 247.

directors are to be appointed by agencies *independent* of the State, and not by the State. The agencies identified in the original Articles were (a) the Papua New Guinea Chamber of Commerce and Industry; (b) the Bank of Papua New Guinea; and (c) the Auditor-General of Papua New Guinea.[181] Mr Mercey's evidence is that it was a carefully considered decision to empower institutions or government officers independent of the executive branch of the Papua New Guinea government to appoint the "B" directors.[182]

246 The State relies on Dr Weis' evidence to rebut this point. His evidence is that those three agencies were "nominated by the State to exercise the State's right of appointment of directors".[183] This was reflected in the Heads of Agreement which provides that "B" directors would be appointed by "agencies nominated by the State",[184] and also the 13 September 2001 Summary of Agreements which repeats the same language.[185] Dr Weis also stated that, although he was appointed to PNGSDP's board by the Bank of Papua New Guinea, he "always regarded [himself] to be a representative of the State on the board of PNGSDP".[186]

247 I do not see how the material put forward by the State assists its case. Simply because the Articles are formulated as they are does not mean that they are intended to be permanent or subject to change only if approved by the State or BHP. That is a leap of logic. Even if the Articles can be read as suggesting that rights have been granted to the State or BHP, s 39(1) of the Companies Act

181 1AB718.

182 Mr Charles Mercey's AEIC at paragraph 18.

183 Dr Iacob Weis' AEIC at paragraph 27.

184 2AB1235.

185 PCB Tab 2, p 15 at [2].

186 Dr Iacob Weis' AEIC at paragraph 28.

is clear that the constitution of a company forms a statutory contract only between the members and the company *inter se*. This position remains unchanged even after the enactment of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed). Section 7(2) of that Act provides that no right is conferred on a third party to enforce any contract binding on a company and its members under s 39 of the Companies Act.

248 Further, the references to the rights of the State's three nominated agencies to appoint one "B" director each do not support the case that the State itself had a right of representation on PNGSDP's board. Instead, it appears that the position consistently taken in the negotiations and ultimately reflected in Article 24 of the Articles was that the State would be one step removed from having representation on the board. Similarly, although Dr Weis may have individually thought of himself as acting on the State's behalf, his subjective belief as to his own loyalties is not quite an answer to the point that the structure *as set out* in the Articles was for the State *not* to have direct representation on the board.

249 I recognise that in 2002, the Auditor General was replaced as an appointing authority by the Minister for the Treasury, who is clearly part of the executive branch of government. But the significance of this decision is attenuated by the fact that a special proviso was inserted into the Articles to ensure that the Minister's nominated director would not be a public official, a member of the ministerial personal staff or an executive member of a political party.[187] The State has a point that the Minister was nevertheless given a right of appointment which he previously did not have. But even so, two of the "B" directors remained appointed by institutions separate from the executive branch.

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187 5AB3078.

So this amendment too does not point to the State having an *equal* governance role to BHP, which is what the State now asserts.

250 Further, and in any event, because there was no mechanism for the appointing authorities – whether the institutions or the Minister, or BHP – directly to enforce Article 24 against PNGSDP (aside from the alleged Direct Enforceability Term which is part of the Agreement), it would appear that whatever oversight either BHP, or the relevant appointing agency, or the State, had would be limited. BHP and the State are, after all, not members of PNGSDP and therefore cannot enforce Article 24 against PNGSDP. And while I recognise, of course, that it is the State's case that it is the Agreement which gives the State and BHP that right, we appear to have come full circle in that that right depends on whether one considers Articles 24, 25, 37 and 38 alone to be sufficient evidence of an agreement that the State and BHP have such a right. In my view, they are not.

The third limb of the Agreed Oversight Structure and OS 234

251 The third limb of the Agreed Oversight Structure which the State pleads is this: "BHP and the State are entitled to information in relation to PNGSDP and access to its books of accounts, accounting records and other records".[188] For convenience, I shall refer to this as "the right to information and inspection". And for the avoidance of doubt, the right to information and inspection also includes the ability to enforce that right against PNGSDP.

252 Whether the State has such a right is substantially the same question which the State poses in OS 234.[189] In OS 234, the State seeks a declaration that

188 Statement of Claim at paragraph 13(c).

189 See HC/OS234/2015 (17 March 2015).

it "is entitled to inspect and take copies of all true accounts, books of account and/or other records of [PNGSDP], including but not limited to the documents listed to the Schedule annexed herein". The pleading in Suit 795 is a little broader because it also claims a right to "information". I will proceed on the basis that the right which the State asserts includes a right to "information". This larger inquiry encompasses the inquiry in OS 234, a matter which is also before me. My analysis of this issue will therefore dispose of the matter both in respect of the Agreement and Agreed Oversight Structure as pleaded in Suit 795, and also dispose of the subject-matter of OS 234.

253 I have already found that the Agreement does not exist and, even if it did exist, was not ratified. This finding means that the analysis here is moot for the purposes for Suit 795. But the State can succeed in its application in OS 234 even if it has failed in S 795 to prove that the Agreement exists. The only consequence if that happens is that the State will not then be entitled to "information", because "information" is not within the scope of the declaration which the State seeks in OS 234. I should also add that because Prakash J's original determination of OS 234 in *PNGSDP (OS 234)* was reversed on appeal, neither party is bound by any *res judicata* or issue estoppel arising from her decision at first instance. Further, I am now free to consider the matter afresh, though of course with the greatest of respect to her findings. And because the Court of Appeal's holding was that OS 234 ought to be decided only with the benefit of evidence as to the existence of the alleged collateral contract, the inquiry into the subject-matter of OS 234 overlaps with the inquiry into the existence of the third limb of the Agreed Oversight Structure.

254 The State argues that this limb is the final piece that completes the Agreed Oversight Structure and renders it effective. Without the right to

information and inspection, the State or BHP will not be able to ensure that PNGSDP complies with its constitutional documents and will not be able to remove errant directors if there is non-compliance.[190] The State submits that the right to information and inspection is set out in Clause 9 of the Memorandum, Article 52 of the Articles, and Rule 20 of the Program Rules.[191] I set these out here for convenience:[192]

> **Clause 9 of the Memorandum:**
>
> True accounts shall be kept of the sums of money received and expended by the Company and the matters in respect of which such receipts and expenditure take place, of all sales and purchases of goods by the Company and of the property, credits and liabilities of the Company; and subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the Articles of Association for the time being, *such accounts shall be open to the inspection of the members and by authorised representatives of BHP Billiton Limited (or any successor corporation) and the Independent State of Papua New Guinea*.
>
> [emphasis added in italics]
>
> **Article 52 of the Articles:**
>
> The Directors shall from time to time determine at what times and places and under what conditions or regulations the books of account and other records of the Company shall be open to the inspection of members (not being Directors) and by authorised representatives of BHP Billiton and the State. No member (not being a Director) shall have any right of inspecting any account or book or document of the Company except as conferred by statute or authorised by the Directors or by the members in General Meeting.
>
> **Rule 20 of the Program Rules:**
>
> The Company must give annually:
>
> (a) a copy of the annual audited accounts of the Program;
>
> (b) a report of the Program's activities describing:

190 Plaintiff's Closing Submissions at paragraph 276.

191 Plaintiff's Closing Submissions at paragraph 277.

192 See 1AB713; 1AB732; 1AB740.

> (i) the financial status of the Program (including details of payments made under Contractual Obligations, the balance of the Long Term Fund and its investments);
>
> (ii) the Projects supported by the Company and amounts committed for or spent on each Project; and
>
> (iii) the amount spent by the Company on Operating Expenses and the proportion of that expenditure to amounts spent on Projects; and
>
> (iv) details of any OTML shares subscribed by the Company,
>
> to BHP …, OTML and the State.

255 To prove that the State and BHP each have the right to information and inspection, the State relies on the evidence of two witnesses, statements in PNGSDP's Annual Reports, and actions taken by PNGSDP in this and earlier litigation.

256 The State begins by noting that, in PNGSDP's first Annual Report for 2002, an extract stated that:[193]

> The arrangements impose on the Company **additional reporting and compliance requirements** above those normally applied to Papua New Guinea companies to ensure that the Company is fully accountable and transparent in its operations. **We will report to the Government of Papua New Guinea**, to BHP Billiton, and to the company's subsidiary Ok Tedi Mining Limited …
>
> **The Company's accounts are subject to inspection by the authorised representatives of the Independent State of Papua New Guinea and BHP Billiton.** The Company will be consulting with both parties to establish guidelines for such inspections and confirming their respective authorised representatives.
>
> [emphasis added in bold]

193 4AB2876.

257 Dr Garnaut's attention was drawn to this extract in cross-examination. He agreed that the extract was consistent with his understanding of the arrangements between the parties.[194] He specifically agreed that the State had a right to inspect the company's accounts.

258 Similarly, Mr Mercey gave evidence at trial that Clause 9 of the Memorandum and Article 52 of the Articles were consistent with the discussions he participated in. He testified that these provisions were inserted because there was a concern that "under statute, BHP Billiton and the State may not have a right to review books, and, therefore, this was placed in".[195]

259 In addition, the State also relies on the fact that PNGSDP's counsel accepted during the hearing of SUM 1669 on 28 May 2014 that the State was entitled to information from the company's books and records, and at the further hearing on 30 July 2014 also indicated that the State has "a right to inspect the accounts" and that "[i]f they want to inspect, they should ask in the right way and come and inspect them".[196]

260 Further, PNGSDP passed a board resolution on 5 September 2014 to the following effect:[197]

> WHEREAS:
>
> (A) Clause 9 of the Memorandum of the Company states the Company's true accounts shall be open to inspection by the authorised representatives of The Independent State of Papua New Guinea (the 'State');

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194 Certified Transcript (24 April 2018) at p 42 (line 2) to 43 (line 25).

195 Certified Transcript (17 April 2018) at p 90 (lines 17–21).

196 Relevant portions of the Notes of Argument are reproduced in *PNGSDP (OS 234)* at [105].

197 Sir Mekere Morauta's 6th Affidavit (18 November 2014) at [8].

> (B) The State has, by its solicitors' letter dated 6 August 2014, asked to inspect the true accounts of the Company;
>
> …
>
> (E) The directors are of the view that the State is likely to abuse its right to inspect the true accounts of the Company (as provided for in clause 9 of the Company's Memorandum) by treating the inspection as a fishing expedition to obtain information which it will use for improper and collateral purposes, including harassing the Company and its officers and/or employees;
>
> …
>
> IN VIEW OF THE ABOVE, it is RESOLVED THAT:
>
> The authorised representatives of the State shall be permitted to inspect the true accounts of the Company (as provided for in clause 9 of the Company's Memorandum) for the period 1 January 2013 to date in the month of September 2014 at a specific date and time and at a location in Singapore to be determined… subject to the following conditions …

261 The State also relies on the original Defence and Counterclaim filed by PNGSDP in Suit 795, where PNGSDP states that "[i]t is admitted that BHP and the State are entitled, under PNGSDP's Constitution Documents, to inspect true accounts kept by PNGSDP of the sums of money received and expended by PNGSDP and the matters in respect of which such receipts and expenditure take place, of all sales and purchases by PNGSDP and of the property, credits and liabilities of PNGSDP".[198] Although the Defence and Counterclaim was amended to remove that apparent admission, the State submits that at the amendment application, PNGSDP did not contend that the admissions made in the Defence and Counterclaim were inaccurate or misrepresented its position.[199]

262 The State's case, in summary, is that PNGSDP has made admissions in its "affidavits, submissions, pleadings, correspondence and conduct" over a 17-

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198 Defence & Counterclaim at paragraph 17(a).

199 Plaintiff's Closing Submissions at paragraph 291.

month period and that these admissions, taken together with the evidence of Dr Garnaut and Mr Mercey at trial, prove that the State and BHP each have the right to information and inspection.[200]

263 The question before me on this specific limb of the Agreed Oversight Structure is whether the parties to the Agreement, *ie* the State, BHP and PNGSDP, agreed that the State and BHP would each have a right to information and inspection. In other words, the question is whether this third limb of the Agreed Oversight Structure exists. I recognise that the limb has not been pleaded in Suit 795 to be an independent standalone agreement, but for purposes of the inquiry here I will *assume* that it can stand alone. Ultimately this will make no difference to the analysis because, for the reasons I give below, I do not think that BHP and the State have this right.

264 It is obvious that what the State desires is the ability to *enforce* the provisions set out above, *ie*, Clause 9 of the Memorandum, Article 52 of the Articles, and Rule 20 of the Program Rules. So the core question then becomes, did the parties agree that the State or BHP could enforce these provisions?

265 PNGSDP admits that the State can enforce Rule 20 of the Program Rules.[201] This follows from the position it has taken above that: (i) the rights in the Program Rules are entrenched; and (ii) the State is contractually entitled to enforce the Program Rules by virtue of Clause 3.2 of the Master Agreement and s 11 of the Security Trust Deed. But PNGSDP denies that the witnesses' evidence or its past conduct in either this or the earlier litigation reveal any agreement between the parties that the State and BHP can enforce Clause 9 of

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200 Plaintiff's Reply Closing Submissions at paragraph 242.

201 Defendant's Closing Submissions at paragraph 294.

the Memorandum or Article 52 of the Articles. This also follows from its position that non-members cannot enforce the Memorandum and Articles, and no separate written contract exists which gives BHP or the State that right.

266 In my view, Mr Mercey's evidence does not assist the State. This is because he was taken back to his explanation cited by the State at [258] above. As a result, he ultimately clarified that he did not think that the representatives of BHP and the State had agreed during the negotiations that either BHP or the State could enforce Clause 9 of the Memorandum or Article 52 of the Articles. The relevant parts of his evidence are as follows:[202]

> Q: Let me try to explore your logic. In your earlier answer, you were saying that the concern was raised, or the issue was raised that BHP or the State might want to inspect the books of account but may not be able to -- or would not be entitled under statute, and, hence, article 52 was inserted to address that. Are you now trying to say that the concern raised was one of the A directors may not get to see the books because the B directors would block them, or something like that?
>
> A: No. I obviously wasn't clear. What I think, and certainly meant to say, was that the concern was raised that one of the outside parties, BHP or the State, may be prevented from accessing those detailed books of accounts by the actions of the directors who were appointed by other parties.
>
> Q: Right.
>
> A: And therefore, it was decided, I think after very limited discussion, that that clause be introduced so that if such a complaint were raised, then they could point to that provision of the articles and say, "Look, you have to make the books available".
>
> …
>
> Q: …

202 Certified Transcript (17 April 2018) at pp 96 (line 13) to 98 (line 12).

> If I could ask that question. For that right of inspection to be effective, BHP or the State would be able to enforce that right, would you agree?
>
> A: No, that was not the case.
>
> Q: Because there was concern that BHP or the State might not have the right under statute, it was sought to introduce that right of inspection in the articles even though the State or BHP could not enforce that right. Is that your evidence?
>
> A: That's my evidence, and I think that the implication is that there was a lack of logic in that, but there was not, because the parties, at that stage, were willing to rely upon the directors appointed in BHP's case by self, and, in the State's case, by PNG entities, to look after their interests.
>
> And the concern, or the intent of that clause was not to give a right directly to the PNG entities or to … BHP, it was to give something that the directors could point to if other directors sought to prevent access to books.

267 Mr Mercey's evidence undermines the State's case. Further, as PNGSDP rightly points out, not only is Mr Mercey one of the only two witnesses at trial able to give direct evidence about the negotiations in which the State alleges the oral Agreement was entered into, he is also a disinterested witness in these proceedings because he was not appointed to act for either party in the negotiations. This makes his evidence all the more credible.

268 Dr Garnaut's evidence is also not of much use. In my view, the crucial question was not asked of him: questions about *enforcement* of the provisions. And even if his evidence can be interpreted as touching on enforcement, he cannot give direct evidence as to whether the parties agreed this at the negotiations where the oral Agreement was allegedly entered into. Only Mr Mercey can do that.

269 Similarly, although the extract from the 2002 Annual Report uses language which suggests that PNGSDP is under an obligation to report to the State and BHP, it does not follow from PNGSDP having such an obligation that the State and BHP have a right to enforce Clause 9 of the Memorandum and Article 52 of the Articles against PNGSDP. In the first place, it should be noted that Article 52 does not create any rights; instead it gives the directors the power and discretion to delimit a right of inspection which is created elsewhere. It is only Clause 9 of the Memorandum which creates any rights. And Clause 9, being a part of the Memorandum, can be enforced only by the members of PNGSDP. Under the framework as it existed when PNGSDP was incorporated, so long as the members take into account BHP and the State's interests in enforcing the provisions of the Memorandum as a statutory contract – as logically they would, because the members would have been appointed by the "A" and "B" directors who represent the interests of BHP and the State or its appointing agencies respectively – BHP and the State will have the intended protection. The obvious response from the State is that the members serve essentially at the pleasure of the directors, and if Article 24 can be amended to remove the right of BHP or the State (through its appointing agencies) to appoint directors (as it now has been) the safeguard for the State and BHP in Clause 9 becomes entirely illusory. That is true, but that then is a flaw arising from a failure to fortify the rights under Article 24. I have already addressed this point above. In essence, I accept that PNGSDP does have an obligation to both the State and BHP under Clause 9, but the only persons who can enforce them are the members of PNGSDP, as they are PNGSDP's only counterparties to the statutory contract that is constituted by the Memorandum and Articles. Third parties such as BHP or the State have no right to enforce Article 9. That may be considered a loophole. But the fact remains that the parties contemplated rights of inspection and failed to make provision to fill this gap.

270 The same reasoning applies to the board resolution. The resolution states that authorised representatives of the State were "permitted" to inspect the books, subject to conditions of PNGSDP's choosing. Such language carries the flavour of the exercise of discretion and not of compliance with an obligation, or at least not compliance with an obligation owed to the State. I acknowledge that the resolution does state that the directors of PNGSDP are "of the view that the State is likely to abuse *its right* to inspect the true accounts of the company (as provided for in clause 9 of [PNGSDP's Memorandum]" [emphasis added]. But the fact that the right which PNGSDP refers to is rooted in Clause 9 of the Memorandum brings us back to the point that Clause 9 is enforceable only by PNGSDP's *members.* It appears to me, in the light of the evidence at trial, that the resolution permitting inspection is more correctly read on the basis that PNGSDP was complying with Clause 9 *vis a vis* the State voluntarily upon the exercise of a right of inspection vested in PNGSDP's members. The resolution, fairly read, does not suggest that PNGSDP acknowledged that the State could *enforce* its right under Clause 9 against PNGSDP directly.

271 This leaves the question of PNGSDP's apparently shifting positions in this and earlier litigation. At the outset, I consider that PNGSDP is not bound by its original Defence and Counterclaim in Suit 795. The apparent admission in paragraph 17 of the Defence and Counterclaim was ultimately deleted. Parties secure leave or consent to amend their pleadings all the time. I do not consider that an admission in a pleading, once withdrawn by amendment either with leave or by consent, continues to bind the pleader. The fact that an admission was once made may, after its withdrawal, be taken to reflect some inconsistency on the part of the pleader and to undermine the credibility of the case it now puts forward. But it is no longer capable of constituting a formal admission.

272 The statements made by PNGSDP's former counsel in the injunction application in SUM 1669 are a different matter: see *PNGSDP (OS 234)* at [105]. PNGSDP's former counsel stated that the State was "entitled to information from the company's books and records" or could inspect the accounts if they wanted and asked "in the right way", as part of PNGSDP's submission that the State had sufficient protection and oversight over PNGSDP such that it was unnecessary to grant the State's application for an injunction restraining PNGSDP from dealing with or disposing of its assets. Fairly read, the submission does suggest that PNGSDP saw the State as having *enforceable* rights to information and inspection.

273 On the whole, however, it appears to me that the weight of evidence is against the State. The evidence of Mr Mercey, as the only witness present at the negotiations where the alleged Agreed Oversight Structure was agreed (as part of the larger Agreement that was also agreed), carries the greatest weight. I therefore find that the State has failed to prove the existence of this third limb of the Agreed Oversight Structure – that the State and BHP unilaterally have the right to *enforce* Clause 9 of the Memorandum and Article 52 of the Articles.

274 For completeness, I note that in *PNGSDP (OS 234)* the State ultimately succeeded on the basis of a pre-incorporation collateral contract that the State and BHP would have a right to information and inspection, the ratification of which PNGSDP was estopped from denying. In the present proceedings, which also include OS 234, however, the State has abandoned all suggestions of a collateral contract existing separately from the Agreement. Arguments on estoppel were also made in the context of the wider Agreement itself.[203] I therefore do not think that a right to information and inspection can be carved

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[203] Plaintiff's Closing Submissions at paragraphs 375 and 388(b).

out separately from the larger Agreement and PNGSDP said to be estopped from denying that the right exists. For the purposes of Suit 795 and OS 234, therefore, there can be no allegation that the right to information and inspection exists separately on the basis of a collateral contract.

The Direct Enforceability Term and the Consent Term

275 The State also pleads that the Direct Enforceability Term and Consent Term are terms of the Agreement. The function of these terms, as the State explains, is to ensure that the Agreed Oversight Structure is directly enforceable by the State and BHP, and that the Structure cannot be changed without the consent of both the State and BHP. It is therefore apparent that their existence *depends* on the Agreed Oversight Structure being found to exist. Having concluded that that Structure does not exist, it becomes unnecessary to set out my thoughts on the Direct Enforceability Term and Consent Term having some separate existence of their own, because they simply cannot even come into being without an Agreed Oversight Structure. For completeness, however, I set out my brief thoughts.

276 Let me deal first with the Direct Enforceability Term. I find the arguments concerning this term difficult to comprehend. In my view, if the Agreed Oversight Structure is found to exist, that must mean that it has been found that the State, BHP and PNGSDP are all parties to an agreement that such a structure exists. That agreement would be a binding, contractual agreement. The State, as a party to the Agreement, would have the right to enforce it. This is simply how contract law works. The State would not need the assistance of a new contractual term to that effect. So there would simply be no need for a Direct Enforceability Term, and consequently no need for this Court to find that such a term exists. I therefore say no more regarding this term.

277 I turn then to the Consent Term. The State says that a contextual interpretation of the constitutional documents will show that this term exists. I do not see how that can be the case, even taking into account the text and context as the State invites me to do. The principles of contractual interpretation are trite and I do not propose to set them out here. In my view, I cannot simply by interpreting the provisions of the constitutional documents find that the parties agreed that the select provisions which form the Agreed Oversight Structure were to be cast in stone and immutable. The text of the various provisions which the State cites as forming the Agreed Oversight Structure is silent as to whether they are to be mutable or immutable. But other provisions in the Memorandum and Articles provide a mechanism for changes to be made to the very provisions which the State says are intended to be immutable. Indeed, PNGSDP's use of those mechanisms by amending the Memorandum and Articles is precisely what has engendered this dispute. The Memorandum and Articles must be read together as a whole. It would be absurd to say that the particular provisions allegedly reflecting the Agreed Oversight Structure cannot be changed when the Memorandum and Articles themselves provide the means to change them.

278 The argument on implication of terms also fails. The State submits that there is an implied term to the effect that only those provisions of the constitutional documents which have to do with PNGSDP's corporate governance structure cannot be amended without consent of BHP and the State.[204] For this submission, the State relies on Dr Weis' evidence that although both BHP and the State had discussed and agreed the Consent Term and Direct Enforceability Term, neither party ever envisaged that their appointed directors or members would act in a manner contrary to the Agreed Oversight Structure.[205] This, however, is quite an odd submission.

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204 Plaintiff's Closing Submissions at paragraph 309.

279 The law on when a term will be implied into a contract is well-established. The first step in the three-step process for implying a term is to ascertain how the gap in the contract arises. The gap can be filled by an implied term *only* if the court discerns that the gap arose because the parties *did not contemplate the gap*: *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp*") at [101(a)]. A term cannot be implied where the parties contemplated the gap but chose not to provide for it, either because they mistakenly thought that the gap was adequately addressed by the express terms of the contract or because they could not agree on a solution to fill the gap (at [94]–[95]).

280 The evidence of Dr Weis was that the parties' negotiators discussed what provisions could or could not be changed without the consent of BHP and the State. What he stated was as follows:[206]

> Q: This question of what could be changed and what could not be changed without the consent of BHP and the State was something that was discussed at the negotiation meetings?
>
> A: Yes.
>
> Q: So would have been discussed in front of Mr Charles Mercey?
>
> A: Yes.
>
> Q: The outcome of these discussions, according to you, was an agreement that those parts we have just gone through, clause 8 of the memorandum and articles 24 and then 37 to 39 of the articles of association, and then particularly rule 20 of the program rules, all could not be changed without the consent of BHP and the State?
>
> A: Yes.
>
> …

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205 Plaintiff's Closing Submissions at paragraph 310.

206 Certified Transcript (3 April 2018) at pp 144 (line 16) to 147 (line 24).

> Q: Dr Weiss, just a few answers ago you said that what could be changed only with consent of BHP and the State was discussed and agreed in front of Charles Mercey and now you are saying that none of you even had in your minds that those things will ever be changed. Which is it?
>
> A: Both.
>
> Q: Well, Dr Weiss, it can't be both. The moment you have a discussion about what can be changed without consent of the State and BHP, you are having in your mind the possibility of articles being changed. Right?
>
> Do you agree, Dr Weiss?
>
> A: To what?
>
> Q: You have said that it was both discussed and not in your mind and I'm asking you whether you agree that it can't be both, you can't both discuss something and not have it in your mind.
>
> A: No. You can discuss something and have the conviction without any doubt that those things won't be touched.

281 In my view, Dr Weis' evidence makes it clear that even the first step of the three-step process for implying a term is not met. The gap, simply put, is what provisions of the constitutional documents may not be changed without the consent of the State and BHP. That is a gap which can be filled by an implied term only if the parties failed to contemplate the gap in arriving at their agreement. But Dr Weis' evidence is that parties did contemplate and even discussed "what can be changed without consent of the State and BHP". So the parties contemplated the gap without providing for it. The threshold for implying a term has not even been crossed.

282 Dr Weis' personal conviction that PNGSDP could not amend those provisions without the consent of BHP and the State is quite beside the point. What that simply means is that this is a scenario where the gap was discussed

but parties chose not to make provision for it on the mistaken assumption that the existing contractual language adequately covered it.

283 Indeed, Dr Weis made it clear that not only was the issue discussed, he thought that the parties had made provision for the issue in the PCA:[207]

> Q: So these three aspects, direct enforceability of some or all of the articles, requirement of consent of BHP and the State for the changes of certain articles, including article 24. And then the third aspect, a right by BHP and the State to jointly instruct changes to the governance structure. All three of these were discussed and agreed during the face-to-face negotiating meetings, correct?
>
> A: Correct. And were incorporated in the program company agreement.

284 Additionally, I also agree with PNGSDP that the State fails on the first step of the three-step process to imply a term because the State and BHP *did* make provision elsewhere as to what terms in the constitutional documents required their consent and approval to amend. In short, the State and BHP provided, by virtue of Clause 8 of the Memorandum and Clause 11.1 of the Security Trust Deed, that only amendments to the Program Rules (and such amendments to the Memorandum and Articles that would change the Program Rules) would require their prior approval in writing.

285 There is simply no basis for the State to invite the court to imply the Consent Term. I decline to do so.

286 I am fortified in my conclusion on both the contextual interpretation and implication of terms arguments by the fact that it has been PNGSDP's consistent practice *not* to obtain approval from the State and BHP for amendments to its Memorandum and Articles that have nothing to do with the Program Rules.

[207] Certified Transcript (4 April 2018) at p 13 (lines 14 to 23).

These include the amendments made on 24 April 2002,[208] 8 November 2002[209] and 31 January 2003,[210] all of which involved amendments to Article 24 of the Articles. These amendments were made well before PNGSDP amended its Memorandum and Articles in October 2012, those being the amendments that engendered this action. Article 24, of course, is one of the provisions which the State says reflects the Agreed Oversight Structure. Indeed, even Dr Weis found nothing objectionable about this state of affairs, as seen from his evidence in his affidavit of evidence in chief that "[p]ost-incorporation of PNGSDP and all the way up to 2012, PNGSDP's operations and affairs were conducted in a manner that was consistent with the Agreement."[211] In the circumstances, it is telling that the State at no time *ever* objected to *three* amendments being made to this apparently crucial article without its consent.

287 For completeness, I note that the State relies on a few other arguments to support its case on the existence of the Direct Enforceability Term and the Consent Term. I have already addressed these arguments above, because these arguments are relevant to whether the Agreement as a whole exists. The first argument is that PNGSDP is incorporated as a company limited by guarantee, *ie* with ultimate control vested in the directors alone. That exacerbates the dangers of the directors having wide freedom to change the Memorandum and Articles. I have already addressed this argument above at [185]–[197]. My conclusion there applies equally here; this argument does not assist the State. The second concerns BHP apparently thinking that it had a right, directly enforceable against PNGSDP, to appoint and remove directors as evidenced by

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208 2AB1222–1223.

209 4AB2708–2710.

210 5AB3127–3129.

211 Dr Iacob Weis' AEIC at paragraph 40.

Mr Bainbridge's letter of appointment. I have acknowledged that this is indeed limited evidence supporting the existence of a directly enforceable right to appoint and remove directors (at [162]). But it is quite unnecessary to have separate evidence establishing the existence of this term because, as I have just said, if the Agreed Oversight Structure is proven to exist it naturally follows that the State can enforce it. The term is simply unnecessary at law. Other arguments founded on the use of the words "and structure" and the organisational chart in PNGSDP's Annual Reports have also been addressed above (at [226]–[232]), as has the argument that the State and BHP each have a directly enforceable right to information and inspection (at [251]–[273]).

288 There is one final argument which I have not addressed. This argument has to do with PNGSDP apparently having sought the State and BHP's consent to make changes to the Program Rules.[212] This argument does not assist the State. Simply because PNGSDP sought the consent of the State and BHP to make changes to the Program Rules does not mean that the State and BHP have a right to enforce provisions of the Memorandum or Articles against PNGSDP.

289 In conclusion, I find that the State has not proven that either the Direct Enforceability Term or Consent Term exists.

Estoppel

290 The State's final argument to support the existence of the Agreement is, as pleaded in its reply, that "PNGSDP is estopped from denying that there is an Agreement".[213] The state argues, in particular, that PNGSDP is so estopped either by an estoppel by representation or an estoppel by convention.

212 Plaintiff's Closing Submissions at paragraphs 345–350.

291 This argument too fails.

292 The State couches its case as PNGSDP being estopped from "denying the existence of facts giving rise to the Agreement".[214] It does so in order to deflect the argument that this aspect of its case amounts to using estoppel as a sword rather than as a shield, *ie* as a means to bring legal obligations into existence rather than as a means to prevent legal obligations from being enforced. But when the State's submissions are scrutinised carefully, the former is precisely what the State is doing. The "facts" which the State alleges that PNGSDP is estopped from denying are indistinguishable from the Agreement itself. The State's plea of estoppel is nothing more than an attempt to use estoppel as a substantive cause of action, *ie* to establish that the legal substance of the Agreement is binding on PNGSDP in estoppel when its plea that it is binding on PNGSDP as a contract has failed. This is impermissible.

293 The State's elaboration of its case on estoppel is as follows:[215]

> 376. In this regard, the State's position is that PNGSDP is estopped from denying the existence of the following state of affairs, *i.e.*, (*1*) the structure and Constitution Documents of PNGSDP were specifically agreed between BHP and the State, where oversight of PNGSDP would be vested equally between BHP and the State (*i.e.*, the Agreed Oversight Structure), (*2*) this oversight structure would be directly enforceable by BHP and the State (*i.e.*, the Direct Enforceability Term), and (*3*) this oversight structure cannot be amended without the consent of BHP and the State (*i.e.*, the Consent Term) – this being the very basis upon which the parties agreed to incorporate PNGSDP to give effect to BHP's exit from OTML and the consequent transfer of its OTML shares to PNGSDP to hold and use for the Purpose …

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213 Plaintiff's Reply & Defence to Counterclaim (Amendment No 4) at paragraph 3G.

214 Plaintiff's Closing Submissions at paragraph 375.

215 Plaintiff's Closing Submissions at paragraph 376.

294 Singapore law has never permitted estoppel of any kind to be used as a cause of action. The Court of Appeal in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 ("*Sea-Land*") stated that "[i]t is trite law that promissory estoppel can only be used as a shield and not as a sword to enforce any rights" (at [23]). This position has not changed. I observed recently in *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 ("*Mansource*") that it is still the case in Singapore law that no kind of estoppel can be used as a sword:

> Singapore law has not yet accepted the view that an estoppel can be used as a cause of action … What is true of promissory estoppel is equally true of estoppel by convention. The position taken by the defendant would allow assumptions to be enforced as promises, and even then without consideration. That would subvert the entire law of contract.

295 The High Court's decision in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023 ("*Rudhra Minerals*") is an analogy to the present case. In *Rudhra Minerals* (at [40]), the High Court held that any agreement formed between the parties would be void for lack of an essential term. The absence of that term made the contract uncertain or, to be more precise, incomplete. The plaintiff argued, in the alternative, that the defendant was precluded by an estoppel from denying the existence of the agreement, or from setting up the defence that the agreement was "subject to contract", or from arguing that the parties had failed to agree an essential term (at [48]). The High Court surveyed the authorities and concluded that the position in Singapore law as to estoppel being used as a cause of action was unresolved (at [52]). It ventured the view, however, that "if the plaintiff were to succeed on its alternative argument based on estoppel, this would lead to a nonsensical result whereby the same facts that were insufficient to give rise to a binding contract could be used to found an estoppel giving rise to a binding contract" (at [52]).

Parties could then use an estoppel as a convenient device to "subvert the established rules of contract formation" (at [52]).

296 I agree entirely with the views expressed in *Rudhra Minerals*. If the State is correct, the entire body of principles concerning contract formation would be entirely swallowed up by the doctrine of estoppel.

297 The State seeks to sidestep this fundamental objection by relying on academic commentaries which demonstrate that a plaintiff can, in certain circumstances, use an estoppel perfectly legitimately as an essential element of its positive case. The commentaries explain that a plaintiff can use an estoppel merely as an "evidential doctrine" to preclude the defendant from disproving certain of the facts upon which the parties' rights and obligations are to be determined: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 4.101.[216] This is explained further by the learned authors of *The Law of Waiver, Variation and Estoppel* (Sean Wilken QC & Karim Ghaly eds) (Oxford University Press, 2012) ("*Wilken & Ghaly*") as follows at paras 9.04–9.05: although it is not permissible for an estoppel to be a cause of action, it can be used evidentially to preclude the representor from denying a fact which is essential to a recognised cause of action. It is perfectly legitimate, in that sense, for the estoppel to be decisive as to whether that recognised cause of action can be established. Similarly, other commentaries note that "an estoppel by representation of fact may supply a fact on which a claimant's cause of action depends and without which it would fail … It may therefore operate so as to confer rights on a claimant that would not otherwise exist …": Piers Feltham *et al*, *Spencer Bower: Reliance-Based Estoppel* (Bloomsbury Professional, 5th Ed, 2017) at para 1.43.

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216 Plaintiff's Closing Submissions at paragraph 378.

298 It would of course be perfectly legitimate for the State to use estoppel in this way. Case law does hold that a plaintiff can be assisted in enforcing a cause of action "by preventing a defendant from denying the existence of some fact essential to establish the cause of action": *Nippon Menkwa Kabushiki Kaisha v Dawsons Bank Ltd* (1935) 51 Lloyd's Rep 147 at 150. All of this is perfectly consistent with Singapore law, in which estoppel is not a rule of substantive law but is merely a rule of evidence: see s 117 of the Evidence Act.

299 But the State is well removed from this legitimate use of estoppel. Here, the "facts" or "state of affairs" which the State alleges PNGSDP is estopped from denying amount essentially to the entire Agreement. To put things simply, if PNGSDP is estopped as the State submits, there is no need whatsoever for the State to establish that the Agreement exists as a contract. It suffices entirely for the State's purposes that PNGSDP is bound by the assumed state of affairs instead. This is precisely the use of estoppel which has not been accepted in Singapore law. I therefore find that the academic commentaries provide no assistance to the State. Indeed, I note that the authors of *Wilken & Ghaly* agree with the statement by Ramsey J in *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] EWHC 1016 at [182] that estoppel by representation "cannot be used as a key element of a claim so as to create a legal relationship where there was none at the outset". This is precisely the thrust of what the State attempts to do here.

300 For the foregoing reasons, I reject the State's contentions on estoppel, whether by representation or by convention.

Issue 2: the existence of the Trust

301 The State also pleads that, pursuant to the Agreement, PNGSDP was incorporated to hold the OTML shares divested by BHP and the dividends and assets derived therefrom on trust for the charitable purposes set out in Clause 3 of the Memorandum, *ie* what I have thus far referred to as "the Trust".[217]

302 The State submits that there is clear evidence of an intention to create a trust as inferred from: (a) the surrounding circumstances leading up to PNGSDP's incorporation, (b) the clear provisions of the constitutional documents entered into pursuant to the Agreement, and (c) the numerous admissions made by PNGSDP to the public and to the State that it is indeed a Trust.[218]

303 In addition, the State argues that PNGSDP was validly constituted as a Trust because BHP as settlor conveyed the trust property, *ie*, its shares in OTML, to PNGSDP on 7 February 2002. Alternatively, the Trust was validly constituted because PNGSDP declared a trust over the OTML shares when PNGSDP's constitutional documents were issued and PNGSDP was incorporated on the terms set out in those documents.[219]

304 The State further submits that PNGSDP's purposes are exclusively charitable, and although PNGSDP may have some commercial or quasi-commercial functions, those are merely ancillary to the larger charitable purposes and therefore the Trust is still exclusively charitable.[220]

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217 Statement of Claim at paragraph 18.

218 Plaintiff's Closing Submissions at paragraph 435.

219 Plaintiff's Closing Submissions at paragraphs 454–456.

220 Plaintiff's Closing Submissions at paragraphs 442–444.

305 I hold that there is no Trust. I begin first with a point about the pleadings. PNGSDP argues that because the Trust was pleaded to arise "[p]ursuant to the Agreement", therefore if the Agreement is found not to exist, the Trust necessarily also fails. I agree. I have found that no Agreement was ever entered into. The Trust that is said to arise pursuant to this non-existent Agreement cannot exist either. I will also address, however, some of the more salient substantive points to show that the pleaded Trust does not, and indeed cannot, exist.

306 There are three main reasons why the Trust does not exist. First, the circumstances leading up to PNGSDP's incorporation, PNGSDP's constitutional documents, and the alleged admissions do not support the allegation that parties intended to create a trust. Second, the express trust which the State alleges to exist was never constituted. BHP did not transfer the OTML shares to PNGSDP as trust property; and PNGSDP was unable to declare a trust over those shares. Third, even if the Trust exists, the State has not adduced sufficient evidence to show that it is exclusively charitable, *ie*, that PNGSDP's commercial or quasi-commercial functions are merely ancillary to the charitable purposes in Clause 3 of PNGSDP's Memorandum. I will address these in turn.

The parties did not intend to create the Trust

307 I first address the alleged intention to create a trust. The first piece of evidence the State relies on is the fact that BHP and the State entered into extensive negotiations which resulted in an agreement under which BHP would gift its OTML shares to PNGSDP to hold and use solely for the purpose of benefitting the people of Papua New Guinea.[221] In my view, however, the fact

221 Plaintiff's Closing Submissions at paragraph 436.

that the parties agreed on this purpose does not mean that they agreed that PNGSDP would be a trust, or a trustee over those shares.

308 Next, the State argues that the intention to create a trust is clearly evidenced by PNGSDP's constitutional documents.[222] In this regard, the State cites certain provisions of PNGSDP's Memorandum and Articles. These include:

(a) Clause 3 of the Memorandum, the objects clause;

(b) Clause 4 of the Memorandum, which states that so long as PNGSDP adheres to the Program Rules, it may do any other things incidental or conducive or in furtherance of the "attainment of the objects";

(c) Clause 5 of the Memorandum, which requires the income and profits of PNGSDP to be applied "solely" to the promotion of the objects of PNGSDP;

(d) Clause 12 of the Memorandum, which provides that if PNGSDP is wound up, its property should be given or transferred to some other institution or company of a charitable or public character having purposes similar to PNGSDP's objects;

(e) Article 49 of the Articles, which also provides that the income and profits of PNGSDP should be applied in furtherance of PNGSDP's objects, and

222 Plaintiff's Closing Submissions at paragraph 437.

(f) Rules 8.2 and 9.2 of the Program Rules, which provide for how the dividends from the OTML shares are to be spent generally in line with PNGSDP's objects.

309 Having examined these provisions, what is clear to me is that PNGSDP is obliged to direct its operations and expenditure to the achievement of its objects. It is also clear that the parties intended those objects to be charitable in their ultimate nature. These provisions are not, however, sufficient to establish that the parties intended to achieve these charitable objects by creating a trust. All they do is tell us that if a trust had been intended, it would likely have been a charitable one; they do not answer the *prior* question whether a trust was intended.

310 The last category of evidence on which the State relies comprises the apparent admissions by PNGSDP that it is either holding the shares "on trust" for the people, or is a "trustee" of those shares. The State cites selection of quotes from PNGSDP's Annual Report for 2012, and from letters, press releases and media statements from 2013. In them, with PNGSDP variously states that the OTML shares are "held in trust"; that it is a "trust-style not-for-profit company" or a "trustee company" or a "trust company"; that it is a "trustee" and "custodian"; and that it employs a "trustee-style structure".[223]

311 Having examined these statements in context, it is clear that PNGSDP was not in these statements conceding or admitting that it is structured as a trust or that it is a trustee. Instead, I accept PNGSDP's explanation that the references to trust-like arrangements were used casually in a lay sense, and not formally, as an admission of legally-binding commitments having been created at the time

223 Plaintiff's Closing Submissions at paragraph 439.

of and by reason of its founding or the divestment of the OTML shares. All of these statements are found in documents directed at the lay public. A lay appreciation of the term "trustee" is simply that it refers to a person who hold assets to be applied for the benefit of another. The lay appreciation of the term certainly does not include the full panoply of rights and obligations which equity attaches in certain circumstances to one who holds assets for the benefit of another.

312 In any event, I note also that the terms used by PNGSDP in these statements varied fairly widely. PNGSDP did not always unequivocally characterise itself as a trust or a trustee. Some care was used, for example, in saying that PNGSDP was only a "trust-style company", or that it employed a "trustee-style" structure.

313 The State also submits that PNGSDP is estopped from denying that the Trust exists.[224] I cannot accept this submission, because of the equivocal nature of PNGSDP's statements and conduct. I add also that the State's use of estoppel in relation to the Trust amounts essentially to estoppel being used as a sword to create a legal relationship carrying legal obligations identical to the Trust when the State's case that the Trust exist has failed. That is an impermissible use of estoppel, for the reasons I have given above (at [294]–[299]).

314 Further, it should also be noted that most of the statements on which the State relies were taken from documents released over a short span of time across 2012 to 2013. This was more than a decade after PNGSDP was incorporated in 2001. This is also more than a decade after BHP transferred to OTML shares to PNGSDP in 2002. The evidential weight to be attached to these Statements in

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224 Certified Transcript (14 August 2018) at p 137 (lines 11–16)

drawing inferences as to the parties' intention over a decade earlier is slight, to say the least.

315 I therefore find that there was no intention whatsoever to create a trust.

The Trust was never constituted

316 In addition, I find that the documentary evidence shows that parties deliberately structured their legal arrangements to ensure that PNGSDP would *not* be a trust. Several provisions in key documents are relevant to this analysis. The first is Clause 7.1(j) of the Master Agreement. This provides:[225]

> (j) (**ownership of Shares**) BHP Minerals is the legal and beneficial owner of [its OTML shares] free from Encumbrances and has full power and authority to transfer to the Program Company good legal and equitable title to the [shares] free from Encumbrances.

317 Next, Clause 3.1(a) of the Master Agreement provides that BHP will transfer its OTML shares to PNGSDP free from encumbrances:[226]

> **3.1 Agreement to transfer the Shares**
>
> In consideration of the agreements by the Program Company contained in the Transaction Documents, BHP Minerals agrees and undertakes that, subject to all Transaction Documents becoming effective, it will:
>
> (a) on the Effective Date, transfer the Shares to the Program Company free from Encumbrances …

"Encumbrances" is defined in Clause 9.1 of the Master Agreement as including any "charge" or "trust arrangement".[227]

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225 2AB1426.

226 2AB1420.

227 2AB1432.

318 These provisions make clear that, as at 11 December 2001, the date of the Master Agreement, BHP had full and unqualified title to the legal and equitable interest in the OTML shares which the parties intended it to transfer to PNGSDP. These provisions also make clear that the parties intended that BHP was to transfer those shares to PNGSDP free of any and all encumbrances. In other words, the parties intended PNGSDP to acquire full and unqualified title to the entire legal and equitable interest in BHP's OTML shares on the date of the transfer.

319 The next document we must look at is Rule 7.2 of the Program Rules., which reads:[228]

> **7.2 Non disposal of Shares**
>
> The Company must not sell, transfer or otherwise dispose of, mortgage, charge or otherwise encumber any interest it has in the Shares. The Company does not breach this clause by entering into a Security Deed between the Company, OTML and a nominated security trustee for the benefit of BHP Billiton and other parties indemnified by the Company under which the Shares are charged in favour of the nominated security trustee.

320 The Program Rules are annexed as a Schedule to the Articles of Association. They came into force immediately upon PNGSDP's incorporation on 20 October 2001. What this means is that from the very moment of PNGSDP's incorporation, which preceded its receipt of the shares on 7 February 2002, Rule 7.2 of the Program Rules operated to prevent PNGSDP from declaring any encumbrance over the shares aside from the one exception set out in the Program Rules. In other words, from the moment it received the shares, PNGSDP was obliged not to encumber them except to the extent provided in the Security Deed.

228 1AB729.

321 The intention of the parties which can be gathered from their written contracts therefore is that BHP had full and unqualified title to the entire legal and equitable interest to its OTML shares; it was to transfer that title outright to PNGSDP; PNGSDP would receive that title *immediately and unconditionally* upon transfer; and PNGSDP could not charge or otherwise encumber that title apart from the one exception specifically set out in Rule 7.2 of the Program Rules. That exception, as paragraph 3.1 of the Deed makes clear, involves *only* PNGSDP charging all its property in favour of the Security Trustee pursuant to the Security Deed.[229]

322 I therefore find it impossible to accept the State's argument that a trust was somehow imposed over the shares at some point in this unbroken and indivisible chain of unconditional events by which BHP transferred legal and equitable title to the OTML shares to PNGSDP.

323 The State's argument is that PNGSDP somehow declared a trust over the shares "when the [c]onstitutional [d]ocuments were issued and PNGSDP incorporated on its terms".[230] But this allegation directly contradicts Rule 7.2 of the Program Rules, which is a part of those very constitutional documents. The State seeks to explain away this difficulty by arguing that Rule 7.2 of the Program Rules in fact operates to prevent PNGSDP from declaring *further* encumbrances over the OTML shares, which had already been encumbered with the Trust pursuant to the Agreement.[231]

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229 4AB2461.

230 Plaintiff's Closing Submissions at paragraph 456.

231 Plaintiff's Reply Closing Submissions at paragraph 156.

324 I find it impossible to see how this could be so. For the State's case to succeed, there must have been a *scintilla temporis* on 7 February 2002 when, just *after* BHP transferred its full and unqualified title to the legal and equitable interest in the OTML shares to PNGSDP and just *before* PNGSDP charged any of the shares to the security trustee under the Security Deed, the Trust latched onto all of those shares. If the State's case is correct, immediately after receiving the OTML shares from BHP, PNGSDP would have divested itself of the equitable interest in the shares under the Trust and would retain only the bare legal title to the shares. But this would mean either that it then lacked the power to charge any of those shares, or could only have given a worthless security to the nominated security trustee, for the purposes of the Security Deed specified in Rule 7.2 for the reasons I give below (at [326]). This would, in turn, mean that the latter part of Rule 7.2 was, in fact, meaningless and otiose. It did not seem to me likely that the parties could have intended such a result, especially when there is no trace of such an arrangement in any of the carefully-prepared documentation surrounding the transfer.

325 Further, I am fortified in my conclusions by two provisions in the Security Deed. The purpose of the Security Deed was for PNGSDP to charge its assets to secure its performance of certain obligations. The first provision is Clause 4(b) of the Security Deed, which provides that PNGSDP must not "declare a trust over or otherwise create or permit the creation or existence of any interest in, or part with possession of, any of the Charged Property or the Mortgaged Property except as licensed by clause 3.4 or permitted by the Program Rules".[232] The term "Charged Property" is defined in Clause 1.1 to mean "*all* the property, rights and assets of the Program Company anywhere (real and personal, present and future) other than Excluded Property" [emphasis

232 4AB2463.

added].[233] The definition of "Excluded Property" is not relevant for present purposes. What is plain from this provision is that the Security Deed prevents PNGSDP from *ever* declaring a trust over *any* of its property, rights and assets. Because the Security Deed is dated 7 February 2002,[234] the date when PNGSDP received BHP's OTML shares, this necessarily means that PNGSDP was contractually unable to declare a trust over those shares.

326 The State's explanation for this is that Clause 4(b) of the Security Deed is intended only to make clear that PNGSDP was restricted from declaring *further* encumbrances over the parties' right to security as provided in the Security Deed.[235] The State's argument appears to be that the shares were already subject to the Trust when PNGSDP entered into the Security Deed, but PNGSDP could nevertheless grant a charge over the shares, and Clause 4(b) prevents PNGSDP only from creating *further* encumbrances on the property already charged. But Clause 4(b) of the Security Deed speaks of further declarations of trust, which is legally impossible if a trust has already come into existence over the shares. If the State's submissions are accepted, at least part of Clause 4(b) would have been meaningless from the outset. I cannot accept that the parties intended this.

327 Leaving aside the question of declaring a further trust over property caught by the Trust, I also have serious doubts about PNGSDP's power to create a *charge* over shares which were already subject to the alleged Trust. The nature of a charge was recently analysed in the High Court decision of *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP*

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233 4AB2454.

234 4AB2453.

235 Plaintiff's Closing Submissions at paragraph 461.

Singapore Pte Ltd and another matter [2018] SGHC 215. After a survey of the authorities and academic commentaries, Abdullah J concluded that a charge is "an encumbrance on the *full equitable ownership* which exists to benefit the chargee" [emphasis added] (at [45]). He held that a charge did not involve a transfer of ownership, but instead was a creation of equity, "appropriating the subject matter to an equitable interest that binds the world other than a *bona fide* purchaser of the legal title for value without notice" (at [43]). The primary purpose of a charge is to give security, and it does so "by appropriating such value or *beneficial interest* of the asset in question to the satisfaction of the debt" [emphasis added] (at [52]). Here, if the OTML shares were already subject to the Trust, as the State claims, it is difficult to see how PNGSDP could have given a charge that is an "encumbrance on the full equitable ownership" of the shares; PNGSDP simply would not have that full equitable interest or beneficial interest to begin with. But the parties contemplated, from the very incorporation of PNGSDP, that such a charge be given, as Rule 7.2 of the Program Rules makes clear.

328 Further, even if it is possible to charge only the legal interest in the shares, it is difficult to see how a charge over only legal title to the shares would be meaningful security in any way. So the Security Deed itself would have created only a security devoid of any commercial meaning. I cannot accept that the parties intended this to be the case.

329 The second provision of the Security Deed which fortifies my view that the parties did not intend to create the Trust is Clause 5.1(h). This clause provides that PNGSDP "represents and warrants that at the date of this document", it was "not entering into this document as trustee of any trust or settlement".[236] This clause is slightly different from Clause 4(b) because it

makes a representation as to a fact *existing* on 7 February 2002, rather than creating an obligation binding PNGSDP into the *future*, *ie*, by prohibiting a future declaration of trust. It seems to me clear that what Clause 5.1(h) establishes is that on 7 February 2002 (being the date on which PNGSDP received the OTML shares from BHP), PNGSDP was not to receive the OTML shares *as trustee*, and therefore had the unqualified power to charge those shares to the security trustee. The State suggests that Clause 5.1(h) must be read narrowly in light of the phrase "entering into this document", which the State suggests means that PNGSDP was indeed a trustee over the alleged Trust but not a trustee only insofar as the Security Deed was concerned.[237] But even that narrow interpretation of the clause does not assist the State: the interpretation makes no sense. If the State is correct that the Trust exists, then *all* of the OTML shares transferred to it were subject to that Trust, and PNGSDP could not then be in a position at all to enter into the Security Deed or would only have given worthless security, for the reasons I have just stated. This can only detract from the likelihood that the parties intended the Trust.

330 I should also add that if Clauses 4(b) and 5.1(h) are read together, they operate seamlessly to foreclose virtually all possibility of any sort of trust having attached to the shares. Clause 5.1(h) has PNGSDP represent and warrant that at the time it entered into the security deed it was not a trustee of any of its assets under an *existing* trust; and Clause 4(b) would prevent PNGSDP from declaring any *future* trust over those assets at that same moment in time. There is one far-fetched possibility that can briefly be entertained, if only to be immediately dismissed. This possibility is that the parties always intended that the Trust should attach to the shares upon transfer, and that PNGSDP would

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236 4AB2464–2465.

237 Plaintiff's Closing Submissions at paragraph 460.

necessarily breach either the obligation under Clauses 4(b) or the warranty under Clause 5.1(h). I cannot accept that two sophisticated parties with the benefit of sophisticated legal advice would have structured their written contracts on the basis that carrying out their intention would *necessarily* involve a breach of those contracts, while leaving an absolutely fundamental aspect of their agreement entirely unrecorded.

331 In my view, the foregoing also amounts to a separate reason why the Trust does not exist.

PNGSDP's objects are not exclusively charitable

332 Even if I am wrong on the above, the State has not established that the Trust is a charitable purpose trust. It is therefore void for failure to comply with the beneficiary principle. For a trust that does not comply with the beneficiary principle to be valid as a purpose trust, its objects must be wholly charitable: *Koh Lau Keow and others v Attorney-General* [2014] 2 SLR 1165 ("*Kow Lau Keow*") at [18(b)]. At common law, if the funds of a purpose trust may be used for some non-charitable purposes, the trust will be void: *Koh Lau Keow* at [18(b)]. The harshness of the result is tempered by the fact that the use of the funds towards non-charitable purposes is permissible if the main purpose is charitable and the use of funds for non-charitable purposes is merely ancillary or incidental to the main charitable purpose: *Koh Lau Keow* at [41]–[43].

333 The State places much emphasis on Clause 3 of PNGSDP's Memorandum, the objects clause, and how it provides for charitable objects. In my view, this is true of most of the objects specified in Clause 3 of the Memorandum, particularly those in Clauses 3(i) and (ii) of the Memorandum.

That said, however, PNGSDP also has other purposes which make its objects as a whole *not exclusively* charitable.

334 One of PNGSDP's express objects in Clause 3(iii) of the Memorandum is that PNGSDP is to be run in accordance with the Program Rules. Rule 9 of the Program Rules sets out how PNGSDP is to spend the income which it receives.[238] Rules 9.2 to 9.5 oblige PNGSDP to spend its income first towards its operating expenses, next to meet its contractual obligations, and after that be used to meet any calls by OTML. It is only then that income can be allocated as an accretion to the capital of PNGSDP's Long Term Fund. Rule 10 of the Program Rules governs how PNGSDP can spend the capital of the Long Term Fund.[239] This priority of expenditure is largely the same as in Rule 9. PNGSDP must first meet contractual obligations and next any calls by OTML. Only then can the capital of the Long Term Fund be used for projects with sustainable development purposes. The term "contractual obligations" referred to in Rules 9.2 to 9.5 and Rule 10 of the Program Rules is defined in Rule 21.1 of the Program Rules to mean PNGSDP's obligations to indemnify third parties under various deeds of indemnity issued to the State, to BHP, and to directors of OTML; and also obligations to make payments under a subsidy deed entered into by PNGSDP and OTML, and under a funding facility deed.[240]

335 The first point to note is that the Program Rules oblige PNGSDP to spend its money on a number of purposes before it can spend anything on projects for sustainable development purposes. And all of these high-priority purposes which PNGSDP must elevate before its charitable purpose are not, on

238 1AB730; 10AB7312.

239 1AB732; 10AB7314.

240 10AB7323.

any view, charitable themselves. All of them inure to the private benefit of PNGSDP or others. For a purpose to be classified as "charitable", it must fall within one of the four heads identified in the classic decision of *The Commissioners for Special Purposes of the Income Tax v John Frederick Pemsel* [1891] AC 531: (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; and (d) other purposes beneficial to the community. All of these priority obligations are entirely for the benefit of private parties and of no benefit to the wider community in Papua New Guinea. PNGSDP's obligations under the deeds of indemnity are to the benefit of the indemnified parties: BHP, the State and the OTML directors. Its obligations under the subsidy deed between it and OTML are to make payments to subsidise certain interest and fees of another private party: OTML.[241] And PNGSDP's obligations under the funding facility deed are to repay BHP for any funds advanced by BHP to PNGSDP to help it pay for the subsidies to OTML, or any claims for indemnity. These obligations inure to the benefit of BHP.[242]

336 The State has failed to establish that PNGSDP's objects are wholly charitable, or even that the expenditure which the Program Rules prioritises over PNGSDP's charitable purposes are merely ancillary to those purposes. Nor can it be argued that these priority purposes are purposes which are ancillary to the charitable purposes because they were part of a package deal which enabled PNGSDP to acquire the assets to carry out the charitable purposes. If that reasoning sufficed, then every purpose trust could be structured as a charitable purpose trust even though the bulk of its purposes are non-charitable. The fact that the parties expressly elevated the contractual obligations to take priority over spending on sustainable development projects suggests that it is these

241 3AB1582.

242 2AB1559.

elevated obligations, if anything, which were the overriding object of any Trust which the parties might have created. Such a trust therefore cannot be said to be charitable. Such a trust is void at common law as a non-charitable purpose trust.

337 Indeed, the fact that PNGSDP has these other purposes suggests that it carries out non-charitable activities as an independent object of the trust. PNGSDP's expenditures towards its contractual obligations are ends in themselves and are not merely the means to or consequence of some other charitable end. In *Koh Lau Keow*, the Court of Appeal held at [45] that such a trust could not be considered exclusively charitable.

338 In reaching this conclusion, I am fortified by the evidence placed before me by PNGSDP. PNGSDP relies on a letter dated 19 April 2006 from the Internal Revenue Commission of Papua New Guinea to Deloitte Touche Tomatsu, concerning PNGSDP's application for charitable status.[243] In short, the Commission denied the application, because it considered that the dominant purposes of PNGSDP were to "manage the finances of OTML and subscribe further capital to OTML". In addition, the Commission also considered that two-thirds of the income received was spent on non-charitable purposes, while only a third was spent on charitable activities.

339 I agree with the State that the Commission's findings are obviously not binding on me. The Commission's determinations were also made on the basis of Papua New Guinea law. But it is not suggested that the Papua New Guinea law of purpose trusts and of charitable purposes trusts is any different from Singapore law. And I consider it telling that the State has not called evidence

243 5AB3591.

to contest the point that the bulk of PNGSDP's income was directed towards non-charitable purposes in 2006, and to show that expenditures have since shifted in favour of charitable purposes or at least give a picture of the current ratio of expenditures.

340 I therefore take the view that the alleged Trust does not exist because even if the parties intended it to come into existence, it would be void at common law as a non-charitable purpose trust.

341 For the three reasons I have identified above, the State fails on its case in relation to the Trust.

Issue 3: Breaches of the Agreement or Trust

342 The State also pleads that PNGSDP has breached the Agreement and the Trust by: (a) effecting changes to its Memorandum; (b) failing or refusing to provide an account to the State of all its dealings with its assets; and (c) dealing with its assets in breach of the Program Rules and the agreed objects set out in Clause 3 of the Memorandum.

343 I have found that neither the Agreement nor the Trust exists. The pleaded breaches of the Agreement and the Trust must correspondingly fail.

Issue 4: PNGSDP's Counterclaim

344 PNGSDP also mounts a counterclaim in response to the actions of Prime Minister O'Neill on 24 October 2013 in purportedly removing all of PNGSDP's directors and replacing them with a "Transitional Management Team", and in terminating the appointment of Mr David Sode as Managing Director of PNGSDP.

345 Its pleaded counterclaim asks for two declarations.[244] First, a declaration that under Singapore law: (a) the purported removal of all of the directors of PNGSDP is of no legal effect, and (b) the purported termination of the appointment of Mr David Sode as Managing Director of PNGSDP is of no legal effect. Second, a declaration that the board of directors of PNGSDP as appointed from time to time in accordance with PNGSDP's Memorandum and Articles have full authority to manage the business of PNGSDP in accordance with the same.

346 The State's reply is that PNGSDP has failed to join any of the members or directors of PNGSDP or BHP to this suit, even though they would be persons whose interests may be affected by the declaration sought.[245]

347 In my view, it is unnecessary to make the declarations sought. The result of the State failing on its case in this action is that the directors and members of PNGSDP are not bound by any Agreement or Trust. They are bound only by the suite of written contracts which the parties entered into on the occasion of PNGSDP's incorporation, and any relevant written contracts entered into thereafter. The directors and members of PNGSDP are free to manage the business of PNGSDP according to its Memorandum and Articles. Prime Minister O'Neill's actions also do not have any effect as a matter of Singapore law. As PNGSDP itself admits, the declarations serve to nothing more than to reflect the legal position which arises from the State's claim failing. In light of my findings on the State's claim, I therefore find that there is no real controversy remaining for this court to lay to rest by making the declarations which PNGSDP seeks.

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244 Defence & Counterclaim (Amendment No 4) at paragraph 96.

245 Plaintiff's Reply Closing Submissions at paragraph 257.

Conclusion

348 For all of the reasons set out above, I hold that the State fails entirely in its claim against PNGSDP. It is not entitled to the relief sought. I will hear the parties on the form of the judgment to be entered in light of these reasons, any consequential orders and on the issue of costs.

Vinodh Coomaraswamy
Judge

Alvin Yeo SC, Koh Swee Yen, Wendy Lin, Joel Quek and Sean Poh
(WongPartnership LLP) for the plaintiff;
Philip Jeyaretnam SC, Mark Seah, Shobna Chandran,
Chua Weilin, Andrea Gan, See Kwang Guan and Ashwin Nair
(Dentons Rodyk & Davidson LLP) for the defendant.